SUPREME COURT, U.S.

No. 1138

FILED
MAR 11 1967
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1967

BANK OF UTAH, a Utah corporation, and
BANK OF BEN LOMOND, a Utah corporation,

Petitioners,

v.

COMMERCIAL SECURITY BANK,
a Utah corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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The Bank of Utah and the Bank of Ben Lomond petition for a Writ of Certiorari to review the judgment of the Court of Appeals for the Tenth Circuit entered in this case on the 14th day of November, 1966.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, infra pp. A-1-A-18) is reported at 369 F.2d 19. The opinion of the United States District Court for the District of Utah was not reported. (App. B, *infra* pp. A-19-A-32). The Findings of Fact and Conclusions of Law and Judgment of the District Court are (App. C and D, pp. A33-A40).

JURISDICTION

The judgment of the Court of Appeals was entered on November 14, 1966 (App. A, *infra,* pp. A1-A-18). On the 3rd day of February, 1967, Mr. Justice White extended the time for filing a Petition of Writ of Certiorari to and including the 13th day of March, 1967. The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

1. The respondent bank contracted to perform payroll accounting services on its computer for large employers. Under the contracts for the sale of these services, employees who are not parties to the contracts are required to establish and receive their periodic pay through checking accounts at respondent bank. The question presented is whether the courts below erred in holding that these contracts, which assured respondent of the deposit of $6.7 million dollars annually in employee funds, are not an unlawful restraint of trade in violation of Section 1 of the Sherman Act and unlawfully tie employee checking accounts to respondent.

2. Whether respondent's contracts which compel 100% of the employees covered by the contracts to have checking accounts with respondent, and respondent's declared intention to expand this "no check payroll" plan to other large employers in the market, are in violation of Section 2 of the Sherman Act.

3. Whether a competitor may be held liable under state law for tortious interference with a contract that is illegal under the Sherman Act.

STATUTES INVOLVED

The Sherman Act

15 U. S. C. § 1. "Every contract, combination * * * or conspiracy, in restraint of trade or commerce among the several states * * * is declared to be illegal * * *."

15 U.S.C. §2. "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States * * * shall be deemed guilty of a misdemeanor * * *."

The Clayton Act

15 U.S.C. Sec. 15. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. Sec. 26, That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, as against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven, and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings.

STATEMENT

Petitioners, Bank of Utah and Bank of Ben Lomond, and respondent, Commercial Security Bank, are commercial banks engaged in interstate commerce competing in Weber County, Utah. (R. 40). At the time of trial Bank of Utah had total assets of $17,582,347.00, and Bank of Ben Lomond $3,144,022.00 and Respondent had total assets of $61,640,491.71 and 40% of the checking account business in the market area. (DX M, R 221).[1] First Security Bank, a large state-wide chain, also serves the Weber County area. In 1960, Weber County had a total population of 110,766; the largest city in that county is Ogden, having a population of 70,192. (R. 311).

In 1961, Respondent solicited and made a contract with the Ogden City Board of Education to perform the Board's payroll operations on the bank's computer equipment. (PX 8, R. 371). Pursuant to the contract, the Board supplies Respondent with the names and

1 DX refers to Respondents' (defendants') exhibits; PX refers to Petitioners' (plaintiffs') exhibits.

addresses of the Board employees, their salary rates and payroll deduction information. Each month the Board deposits a single check for the total payroll amount in the bank, and the "net amount due each employee" is credited to a checking account established for each employee at respondent bank. (PX 8, R 372). In addition, the bank prepares W-2 income tax forms and social security reports.

In 1963, respondent entered into a similar contract with the Weber County Board of Education. The Weber County and Ogden City Boards of Education are the only public boards of education in the Weber County area. At the time of the trial, all regular employees of the respective boards, a total of 1,744 individuals, received their pay through checking accounts opened for them in respondent bank pursuant to the contract for the sale of computer services to their employees. (App. A-20. (PX 17, R 404; DX Y, R. 486). In April, 1964, respondent entered into a similar agreement with St. Benedict Hospital, (PX 17, R 404; DX Y, R 486), the performance of which was postponed until after the conclusion of the trial,[2] St. Benedict Hospital has 322 full-time and 127 part-time employees, all of whom came under the contract. (R. 328).

The Ogden City Board of Education pays for the service by maintaining an average monthly balance of public funds in a non-interest bearing demand deposit

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2 St. Benedict Hospital postponed carrying out the contract as a consequence of communications, made by individuals associated with the Bank of Utah to the chief administrative officer of the Hospital, which suggested that the contract was in violation of the antitrust laws. It was these occurrences that gave rise to Respondents' counterclaim upon tortious interference with contractual relations.

account with Respondent in the amount of $150,000.00 (PX 8, R 371; DX 20, R 438). The Weber County Board of Education pays for the service by maintaining an average monthly balance of public funds in a similar demand deposit account with Respondent in the amount of $100,000.00. (PX 21, R 439). St. Benedict Hospital agreed to pay for the service at the rate of 21.7c per employee per pay period. (DX Y, R 489).

All employees of the school boards, who fall within the scope of the contracts, to which they were not privy, are required to receive their pay through checking accounts opened in their respective names at Respondent bank. (PX 8, 10, R 372; PX 46, R 452; D XY, R 490). The contract stated that "the net amount due each employee will be credited to a checking account established for each employee at Commercial Security Bank." (PX 8, R 372). Pursuant thereto, the Ogden City Board informed its employees that "each pay period we will furnish the bank [Respondent] with the payroll data of our employees. The bank will electronically prepare an earning statement for each employee and will deposit the net amount of pay to a Commercial Security checking account in the name of the employee." (PX 10, R 375). The Weber Board likewise instructed its employees that their pay would be deposited in individual accounts in their names in the Respondent bank. (R 140, 141). St. Benedict Hospital informed its employees: "With the information provided by us, the [Respondent] bank will prepare an earning statement for each employee and the net amount due you will be credited to a checking account established for each employee at the Commer-

cial Security Bank. The employee payroll number at the hospital will be used for this checking account. *Therefore, it is necessary to open a new checking account for each employee whether or not they are now dealing with this bank.*" (PX 17, R 405). (Emphasis added).

The board's average monthly payroll deposits in employees checking accounts with Respondent for the 1,744 school board employees alone was in excess of $565,000.00. (PX 30, R 444; PX 43, R 448). Thus, the contracts between the Respondent and the two school boards funneled over $6,500,000.00 annually in wages and salaries of all the regular employees of the only public school boards in Weber County into checking accounts at the Respondent bank even though the employees were not parties to the contracts. (PX 20, 21, R 438, 439).

The checking accounts which the employees are obliged to have with Commercial for receipt of their pay, are regular demand deposit accounts that can be drawn on by the employee in the usual manner, i.e. by writing a check. Although an employee is not required to maintain any balance on deposit and may withdraw his entire pay and deposit it in another bank, Commercial encourages employees to use their account at Commercial as their permanent checking count. (R 234). Under the terms of the contract, Commercial agreed to confer certain benefits on school employees which are not available on an equal basis to other depositors. (R 294). Not only does Commercial agree to give each school board employee the lowest service charge rate applicable to any class of individual

checking account service offered by the bank, regardless of the amount maintained on deposit by the employee, (R 224) but it also allows each employee to write two checks against his account free of any service charge. Hospital employees are allowed one free check per pay period.

The practical and natural effects of the contracts between Commercial and the school boards was to establish for Commercial a large clientele that was effectively insulated from the competition of other banks. Although an employee may, without service charge, withdraw his funds and deposit them in a bank of his own choice, the evidence demonstrated the impracticability of such an alternative from the point of view of the employee even if he were willing to forego the advantage of the discriminatory low service charges and the free checks. (R 139-144, 147, 148). The inconvenience of transferring monthly earnings from one bank to another; the unnecessary annoyance and additional efforts required to maintain and balance two checking accounts;[3] the delay in receiving credit at the second bank because of the transfer process (R 139-148); all tend to tie the school board employees to Commercial.

In an attempt to retain the accounts of employees captured by Respondent under these contracts, Petitioner adopted a plan euphemistically labeled an "automatic transfer plan." The plan was neither automatic nor a transfer. Unlike the plan which Congress has permitted Federal agencies to contract for, and which provides for the direct and automatic transfer

3 In addition there are, of course, several legal responsibilities imposed upon holders of checking accounts under state law.

by the agency performing the computer payroll processes of the employee's net pay to an account in any bank designated by the employee,[4] the Petitioners had to solicit a power of attorney from the employees authorizing Petitioners to write a draft on the employee checking account at Commercial for transfer of the funds to Petitioners' banks. The "automatic transfer" plan did not, however, enable Petitioners to compete from a position of equality with Commercial for the tied employee accounts for several reasons:

First, among school employees there is a substantial turnover. Commercial has the initial and immediate advantage of opening acocunts for new employees without the necessity of soliciting them, or competing with other banks for their checking account. (R 81, 122, 139-148).

Second, a transfer out of Commercial pursuant to the exercise of a power of attorney by Petitioners necessarily resulted in customer service that was clearly inferior to that which an employee could have by leaving his funds on deposit at Commercial (R 145). On any given payday petitioners did not know exactly

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4 "Notwithstanding subsection (a) of this section or any other provision of law, and under regulations to be prescribed by the Secretary of the Treasury, the head of an agency may, upon the written request of a person to whom payment is to be made, authorize a disbursing officer to make the payment—

(1) by sending to the financial organization designated by that person a check that is drawn in favor of that organization and for credit to the account of that person; or

(2) if more than one person to whom a payment is to be made designates the same financial organization, by sending to the organization a check that is drawn in favor of the organization for the total amount due those persons and by specifying the amount to be credited to the account of each of those persons." 79 Stat. 582 (1965), 31 U.S.C. § 492 (b) (Supp. 1965).

how much money could be transferred out of Commercial because of fluctuations in deductions or net pay rates causing variations in employee net pay. Since that information was unavailable to Petitioners, their drafts are occasionally returned by Respondent marked insufficient funds, (R 145, 146) with the consequence that Petitioners' customers are inconvenienced in not having immediate access to their pay. (R 145). To avoid overdrafts on employee accounts at Commercial, Petitioners must underdraw employee accounts, thereby leaving balances in employee accounts at Respondent of up to $50.00. (R 188). Underdrafts upon employee accounts aggravate customer dissatisfaction since they do not have immediate and ready access to their full pay. Furthermore, processing of the drafts causes delays which further exacerbates customer annoyance with the "automatic transfer plan".

Third, from the employee's point of view, he must endure the unnecessary annoyance and inconvenience of having to inspect and balance the statements of two different banks every month. These factors have caused employees to discontinue the use of the "automatic transfer plan". (R 178).

Because of these factors, the "automatic transfer" plan has failed as a competitive means of attracting school employees. The largest number of employees ever to use the plan was 67 out of a total of 1,744 employees, and at the time of trial the number had dropped to 48, or 3% of the total number of employees under the payroll plan. (R 178). Moreover, the small number of employees willing to participate in the "automatic transfer plan" and the banking expense of exercising

the power of attorney for each employee each pay period have made it uneconomical for Petitioners to utilize this method to acquire and retain accounts.

Respondent has indicated that it intends to establish the same plan with other large employers in the Ogden area. (R 232, 233, 261). Despite the fact that the plan had been adopted by only 4 of the 70 major employers in the Ogden area, its effect on Petitioner banks has already been made apparent. (R 302, 447, PX 42).

At the end of 1960, before Commercial's contract became effective, the Bank of Utah had 8,081 checking accounts of all types. By the end of 1961, before Commercial's contract had been in force a sufficient length of time to show any appreciable effect upon the business of the Bank of Utah, the checking accounts in that bank had increased to 8,371. By the end of 1963, Commercial's contract had been in effect two years with the Ogden Board and covered all regular full-time employees on both the Ogden and Weber Boards. At that time, the number of Bank of Utah checking accounts of all types had dropped to 8,079, a loss of 292 accounts (PX 24, R 441). In 1960, Bank of Ben Lomond had 1991 accounts; in 1961, the number had increased to 2,194, but by 1963, the number dropped to 2,144, a loss of 50 accounts. (PX 24, R 441).

By contrast, Commercial had 10,802 checking accounts of all types at the end of 1960 and 12,258 in 1961. By the end of 1963, after the contract had been operating a sufficient length of time to show an effect on its business, Commercial increased its accounts to

12,680, an increase of 1,778 accounts, and by June 3, 1964, had 12,867 accounts. (PX 27, R 442).

Moreover, the average yearly percentage growth of demand time and savings deposits of the Bank of Utah from 1954 to 1961, was 9.7%.[5] Commercial's yearly percentage rate of growth for the same period was 5.66%. The average rate of growth of the Bank of Utah from October, 1961, to October, 1964, fell to 6.53%, while Commercial's rate of growth for the same period jumped to 8.54% (PX 34). In the period from October, 1963, to October, 1964, a year that Commercial had the benefit of having the Weber Board employees as well as the Ogden Board employees under the "no check payroll" contracts, Commercial's percentage increase in demand deposits as compared with the previous year was 12.2%. For the same period Petitioners' growth of demand deposits as compared with the previous year showed the following losses in percentage growth rate, a minus 3.45% for the Bank of Utah, and a minus 2.14% for the Bank of Ben Lomond. (PX 37).

OPINIONS BELOW

Petitioners challenged the validity of the contracts between Commercial and the two boards of education under sections 1 and 2 of the Sherman Act, and sought damages and injunctive relief. (R 2-10, 18). Commercial filed a counterclaim against Petitioners charging that Petitioners had tortiously induced St. Benedict

5 The high growth rate of the Bank of Utah is explained in part by the fact that this Bank was established in 1952.

to breach its "no check payroll" contract with Commercial.

The district court held that the contracts between Commercial and the school boards were not illegal and that Petitioners had tortiously interfered with Commercial's contractual relations with St. Benedict Hospital.

The opinion of District Court Judge Willis W. Ritter did not make clear whether the court found that the contracts did not restrain trade or even though they did, that the restraint was reasonable. The district court's emphasis upon the two free checks and Petitioner's "automatic transfer plan" as means for employees to remove their funds and bank elsewhere, suggests that the lower court acknowledged the existence of a restraint but held that the restraint was not an unreasonable restraint of trade.[6] The district court did not, however, in its opinion or Findings of Fact, examine:

1. The effect of *customer convenience* as a determining factor in competition between banks, and, specifically employee reluctance to transfer funds from one bank to another in light of the deterring factors present in this case;

2. The cost to Petitioners and inconvenience to the employee-customers arising out of the "automatic transfer plan"; and

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6 See Finding 15. The court indicated there was no restraint imposed by the contract in Finding 15, a finding that is inconsistent with the court's opinion and reflects the error of analysis by the District Court. Petitions claims prejudicial. See argument infra.

3. The availability of alternative plans dispensing with the requirement that each employee have a checking account with the banks performing the payroll operations. Indeed, the court apparently failed to understand the significance that these alternatives could have in determining the legality of the contracts in issue. Although Petitioners attempted to adduce evidence that a computer payroll service plan could be economically operated without requiring that accounts be established for each employee covered by the plan, (R 239, 240, 241) the Court was clearly unsympathetic and cut short a full exploration of the issue. Finally, the district court held that shifting the basis of banking competition from competition for the individual accounts to competition for large employers who could deliver hundreds of individual accounts under a single contract was not anti-competitive, but on the contrary was "a product of competition. (App. A-37, 38, Fdg. 16, R 34).

The Court of Appeals for the Tenth Circuit affirmed on all points. That court, although holding that the contract did not constitute a *per se* violation (App. A-8), failed to consider whether the restraint imposed by the contracts on employees of the boards is in any way necessary to the contract for the performance of payroll services on a computer. The Court saw as a further issue: "Whether the restraint involved in having to take some affirmative action to transfer funds from Commercial Security Bank to the bank of the employee's choice is unreasonable." (App. A-8). Without answering the question, the Court of Appeals concluded, "We cannot accept appellant's contentions for

the principal reason that the causal connection between the plan and the effects allegedly brought about is simply too tenuous," (App. A-10) although the court also found, (App. A-6) "it would be unrealistic to say that Commercial Security did not realize some net increase in deposits and Appellants some net decrease, with a corresponding effect on the funds available to the respective banks for their operations in the interstate financial market in loans and securities. Interstate Commerce was thus affected to some extent." The Court of Appeals also apparently agreed with the position of the district court that competition for customers in wholesale lots was not an invalid clog on competition.[7]

The Court of Appeals also affirmed the district court on petitioner's claim under Section 2 of the Sherman Act and affirmed the lower court's judgment on the Counterclaim.

(App. A-11) . . . "Absent definitive proof that the plan had an adverse effect on commercial banking in the Ogden area, we think that whatever restraint the plan produced is reasonable in the light of the competitive manner in which the contracts were let; the opportunity available to appellants to compete in the future for payroll services contracts and individual employee accounts and the benefits to the boards and the employees and the public."

REASONS FOR GRANTING THE WRIT

I. RESTRAINT OF TRADE IN VIOLATION OF SECTION I OF THE SHERMAN ACT.

(A) *Did the contracts impose a restraint on Trade and Commerce?*

Contrary to undisputed evidence in the record, the Honorable Willis W. Ritter found: . . . "None of the Contracts restrains any person or trade, and each of them encourages, fosters, and enhances competition between the commercial banks doing business in Utah. . . ." (App. A-37, R 34.) The Court of Appeals, however, without explicitly setting that finding aside, recognized the restraint apparent on the face of these contracts in addressing itself to what it considered the key issue in the case: "Whether the restraint involved in having to take some affirmative action to transfer funds from Commercial Security to the bank of the employee's choice is unreasonable." (App. A-8.) While implicity overruling the lower court's finding that the contracts imposed no restraint whatsoever, the Court of Appeals failed to make the antecedent and critical inquiry as to the nature of the restraint. Instead, the Court of Appeals decided that employees had reasonable means for escaping the restraint (i.e. the "free checks" and "automatic transfer plan"), rather than examining the competitive advantages the restraints gave respondent. The Court failed to consider the effect of the factor of convenience, or its converse the penalty of inconvenience, on the habits and customs of banking customers, or to consider whether the restraint imposed was necessary to the law-

ful purpose of the payroll processing contract, or if the restraint was ancillary, whether its anti-competitive effects were, in view of the alternatives available, permissible under the Sherman Act.[1]

In short, petitioners contend that the District Court's findings are completely unsupported by the record and in conflict with the undisputed evidence, and that the Court of Appeals simply failed to analyze whether the restraint imposed was unreasonable in light of all the facts and the business context in which the restraint was imposed.

Respondent's computer payroll contracts imposed a restraint upon commercial banking in general, and employee checking accounts in particular, and that the restraint imposed is substantial is clear from undisputed evidence in the record. All 1,744 employees covered by the two school board contracts had accounts at Commercial Security as a result of the contracts between their employers and respondent (R. 312). While an officer of respondent estimated that respondent would have had approximately 40% (about 698 accounts) of the accounts of school board employees prior to the implementation of the contracts (R. 222), the undisputed evidence showed and the trial court in its opinion

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1. This Court in the case of **United States v. Philadelphia National Bank**, 374, U.S. 321, 357, 358, recognized the convenience factor in banking.

"Habit, custom, personal relationships, convenience, doing all of our banking under one roof appear to be factors superior to changes in the interest rate level."

"The factor of inconvenience localizes banking competition as effectively as high transportation costs in other industries."

found that respondent had accounts for 100% (1,744) (R. 20, App. A 20, R. 77, 78) of the regular full-time employees of both school boards after the two contracts became effective. Thus, without having to expend any effort to win the custom of school board employees, Commercial Security immediately acquired approximately 1,056 new accounts (the remaining 60% of the regular school board employees) by virtue of its contracts to sell computer time for payroll processing to employers. But even these figures fail to fully demonstrate the obvious restraint imposed upon competition for individual checking account customers, the lifeblood of small banks, and the completely unjustified finding of the District Court that there was no restraint at all. Upon implementation of the contracts between respondent and employers, every employee — whether or not he had formerly been a customer of respondent, and despite the fact that he had no say in the contract for selling computer time — had to have a checking account with respondent to have access to his pay. In light of the uncontradicted evidence that banking competition consists primarily in providing customer convenience and simplification of business relations,[2] the requirement that each employee have an account at respondent bank tends to tie all employees to respondent for checking account services because of the annoyance and incon-

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2. The same effect resulted from the hospital contract which was placed into effect after trial and was the subject of Respondent's Counterclaim (D. 44, R. 490, App. A 18).

This Court has explicitly noted the convenience factor in service industries in general and the banking industry in particular in the context of mergers. **United States v. Philadelphia National Banks**, 374, v.c. 321, 358 (1961). Neither Court below weighed the factor in determining the effect of the restraint in this case.

venience of having to maintain two checking accounts. (R. 139-148, R. 372, 452, PX 8, 10, 46.)[3]

Since the District Court held there was no restraint, and the Court of Appeals examined the hypothetical reasonableness of the means to escape from the restraint rather than whether the restraint was unreasonable in its imposition and effect, neither court considered petitioners' uncontradicted evidence that the restraint imposed had substantial anti-competitive effects. The average monthly payroll of school board employees funneled into Commercial Security by virtue of these contracts is in excess of $565,000.00. (R. 313.) The yearly increment in cash flow into respondent by virtue of the contractual requirement that each employee have a checking account with respondent is approximately $6,700,000.00. (PX 29, 30, R. 313, 443, 444).

Respondent's estimate of its share of the checking account market for school employees prior to the contracts was that it enjoyed 40% thereof (R 221, 222). Respondent's officer testified that by May, 1964, 50% of the school employees were "active" customers and used the checking accounts established for them under the contracts from pay period to pay period, while the accounts of the remaining 50% of the school employees under the contracts were classified as "inactive" accounts, because they were drawn down to a low balance

3. A further ramifiction of tying employees to Respondent for checking account services is the very real, but unmeasurable fact that a bank having a customer's checking account business is in a preferred position to cross-sell the entire gamut of other services offered by modern commercial banks. This facet of banking competition has also been acknowledged by this Court, **United States v. First National Bank & Trust**, 376, U.S. 655, 667 (1964), and was completely ignored by both courts below.

by the 15th of the month (R 223). Thus by Respondent's evidence, its share of the "active accounts" increased 20% as a result of the contracts. Respondent was also able to further insulate itself from competition by virtue of the restraint. In dollar amount the share of the pay of school board employees already banking at Commercial and thus insulated from competition amounted to $2,680,000.00 per year; while the increase of 60% in employee accounts because of the payroll contracts increased the checking account deposits with Respondent by $4,020,000.00 each year.

Consequently the evidence clearly demonstrated that the restraint imposed by the payroll contracts gave Respondent the following benefits:

a. Respondent's 40% share of the market in school employees checking accounts was effectively insulated from competition.

b. An admitted increase of at least 20% in active school employee accounts, which resulted in an increase in deposits of approximately $56,000.00 each month.[4]

c. The deposit of $282,500.00 from pay of the 50% of the school boards employees respondent claim draw their accounts down to a low balance by the 15th of each month. (R. 223). These accounts also provide

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4. Respondent's officer testified that Respondent had 40% of the school employees prior to the inception of the contract; he also testified that by May 1964 Respondent had active accounts for 50% of the school board's employees. The foregoing computations are extremely conservative regarding the benefits of Respondent because no allowance is made for the benefit Respondent receives as a result of acquiring the deposit of the working husband or wife of the school board's employees. (R. 300.)

respondent with a daily average balance of $75,425.00. (R. 315.)[5]

d. Demand deposits with a monthly average of over $350,000.00. These are the deposits that represent the payment to Respondent for the computer payroll services rendered to the school boards. (PX 20, 21, R. 438, 439.)

e. A preferred position to cross-sell other banking services such as, savings accounts, loans, and trust services to the employees coming under the contracts. (R. 154, 155.)

f. The advantage of having all new employees of the school boards being required to open accounts with Respondent at the office of the employer at the time of their initial employment. (R. 81.)

An increase in the average daily balance of deposits of a bank results in an immediate increase in the earning capacity of the bank; the average daily balance is the base from which the funds available to make loans and for investment in securities is determined. Increased

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5. Commercial's officer characterized the 50% leaving funds and deposit throughout the month as "active accounts" and the 50% drawing down to a low balance by the 15th of the month as "inactive accounts." (R. 222). These terms may be misleading. An inactive account does not necessarily mean that 50% banked elsewhere since many in this category may draw out this cash and not use a checking account or they might operate on credit and pay most of their bills from their commercial account at the beginning of the month and operate on a low cash basis for the remainder of the month. Consequently, 50% is, in all probability a minimum figure in computing the increase of accounts realized by virtue of the contract provisions petitioner claims violation of the Sherman Act. The rapid turnover of teachers and the fact that First Security Bank was not a party to this litigation make a more specific estimate of the number of employees tied to Respondent by virtue of these contracts practically impossible.

earnings provide greater capital and surplus for a bank and thereby increase the size of the loan which may be made to one borrower; thus, an increase in the lending limits puts the bank in a more favorable position to compete for the account of large commercial borrowers.[6]

Petitioners' undisputed evidence demonstrating the substantial effect of the restraint was supplemented by uncontradicted testimony of the school board employees who dropped their accounts with petitioners because of the inconvenience of maintain two checking accounts imposed upon them by respondent's contract with their employers. (R. 139-148). The verticle foreclosure effected by the plan is demonstrated by the following: the instructions given to the employees to bring them under the contracts (PX 6, R 358, DX Y R 4 90); the preferred position granted respondent for customer contact (R. 81); and the discriminatory service charge advantage (R. 223-226). The effect of these restraining features on the individual employee and upon banking competition is demonstrated by the testimony of the school employees (R. 139-148). Consequently, petitioners contend that the District Court's finding that these contracts in no way restrained trade or commerce flies in the face of undisputed evidence to the contrary. The Court of Appeal's analysis that the contracts imposed a restraint, but that employees had reasonable theoretical means for escaping the restraint, skips the crucial analytical step in every Sherman Act case —

6. "But a bank desiring to increase its share of banking business through corporate acquisition would ordinarily need to acquire the other bank's deposits and capital, not merely its assets. For more deposits mean more working capital and additions to capital and surplus increase the lending limit." **United States v. Philadelphia National Bank**, 374, U.S. 321, 344 n. 22 (1963).

whether the effect of the restraint is unreasonable — and imposes upon petitioners the impossible task of proving the negative of the irrelevant question of whether the means of employee escape from the restraint were reasonable.[7]

(B) *The restraint imposed upon competition by the contracts was an unreasonable restraint of trade.*

The Court of Appeals ignored petitioners' contention below that these contracts had many of the central competitive characteristics of tie-ins and group boycotts. The Court has defined a tying arrangement as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any supplier." *Northern Pacific Ry. v. United States,* 356 U.S. 1, 5-6 (1958). Tying arrangements "fare harshly under the laws forbidding restraints of trade," *Times Picauyane Publishing Co. v. United States,* 345 U.S. 594, 606 (1958); because they "deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market at the same time buyers are forced to forego their free

7. The error of the Court of Appeals analysis becomes apparent when its reasoning process is compared to that set out in **Northern Pacific Ry. v. United States,** 356 U.S. 1 (1958). In **Northern Pacific** this Court established the existence of a restraint and examined its necessary effect upon competition. This Court did not find a restraint and then examine whether those subject to the restraint had reasonable means of escaping the preferential routing clauses. By skipping petitioners' evidence on the question of the effect of the restraint the Court of Appeals ignored the key legal question under Sections 1 and 2 of the Sherman Act.

choice between competing products." *Northern Pacific Ry. v. United States,* 356 U.S. 1, 6 (1958).

While respondent's contracts were not typical tying arrangements, because the purchasers (employers) were required to have their employees take a service rather than purchase a service themselves, the "central competitive characteristics" of respondent's contracts is the same. *Atlantic Refining Co. v. F.T.C.,* 381 U.S. 357, 369 (1965). They deny petitioners free access to the market for employee checking accounts, not because Commercial has a better product or a lower price, but because of the leverage gained by respondent's sale of computer payroll services to employers. At the same time employees are forced to forego their free choice between competing banks offering checking account services. If anything, the restraint imposed by these contracts is worse than a tying arrangement in at least one respect: the employees have no choice in the first instance as to whether or not to accept the services tied to the sale of computer services. In traditional tie-in cases the purchaser at least has the option of rejecting the tying product and the tied product. But in *Atlantic Refining v. F.T.C.* (supra) and in this case the parties subject to coercion and restraint have no choice in accepting or rejecting the "tied" product since they are not parties to and have no say in the contract for the sale of the tying product.

Unlike the defendants in *Atlantic Refining Co.* and *Northern Pacific Ry.* (supra) the defendant in this case made no effort to justify or explain why the contracts between Respondent and employers required that employees have a checking account with Commercial.

> "If these restrictive provisions are merely harmless sieves with no tendency to restrain competition, as the (respondents') argument seems to imply (and as Judge Ritter here found), it is hard to understand why it has expended so much effort in obtaining them in vast numbers and upholding their validity, or how they are of benefit to anyone, even the defendant. *Northern Pacific Ry. v. United States*, 356 U.S. 1, 12 (1958): The essential fact remains that these agreements are binding obligations held over the heads of vendees which deny defendant's competitors access to the fenced-off-market on the same terms as defendant." (Ibid.)

As in *Atlantic Refining Co. v. F.T.C.* (supra), these contracts amount to the "utilization of economic power in one market curtail competition in another" *(381, U.S. at 369)* and the foreclosure of competitors from the market for employees' checking accounts captured by the plan *(381, U.S. at 370)*.

While this Court examined the economic impact of the restraint upon competition in *Atlantic Refining Co.* and did not even consider whether Atlantic dealers were free to sell or store the TBA forced upon them by the contract with Goodyear or whether the dealers might engage in the inconvenience of maintaining two separate lines of TBA, both Courts below in the instant case ignored the effect of the restraint and decided that petitioners had failed to prove the means for employees to escape the restraint were unreasonable. (App. A-11, A-27).

The illegal anticompetitive incidents of a group boycott are present as well, although this arrangement is not a "concerted refusal by traders to deal with other traders." *Klors, Inc. v. Broadway-Hale Stores*, 359

U.S. 207 (1959). The concerted refusal by employees to deal is involuntary and is imposed by the contracts between Respondent and employers and the practical factors of convenience and simplification of customer relations inherent in commercial banking competition (R. 139-142.) As the uncontradicted evidence demonstrated, these contracts "cripple the freedom of traders (employees) to sell (choose) in accordance with their own judgment." *Keifer-Stewart Co. v. Seagrams & Sons,* 340 U.S. 211, 213 (1951); they take from petitioners their freedom to solicit employee checking accounts in an open competitive market; id. at 213; and they tend to cripple petitioners' opportunity for growth by depriving them of the lifeblood of small banks—the inflow of capital in the form of demand deposits. (Ibid.) These contracts deprive petitioners of their freedom to sell banking services to employees at the same prices and conditions made available to respondent and have by their "nature" and "character" a monopolistic tendency. (Ibid.) If anything, the restraints imposed upon competition by these contracts are far more arbitrary than the traditional group boycott. In the traditional group boycott the prospective participants are at least free to decide whether to join in such an invidious restraint upon trade and the prospective victim of the boycott has some opportunity to persuade them not to engage in such conduct.[8]

In this case, however, Commercial's contractual agreement with employers that each employee have a

8. It is interesting to note that a school board denied petitioners an opportunity to attend the annual teacher institutes for the purpose of attempting to urge all old customers to continue with them and persuade new teachers to bank with them. (PX 4, R. 356, 357.)

checking account with Commercial, when coupled with the inconvenience of maintaining two checking accounts, left employees with no practical choice as to whether to participate in a plan having the effects of a group boycott and left petitioners with no opportunity to convince employees otherwise. The necessary effect of Commercial's contracts with employers is to make employees unwitting participants in a group boycott of Commercial's competitors and even denies the employees the opportunity to choose otherwise and competitors the opportunity to persuade them otherwise.[9]

Since the District Court found no restraint and both the District Court and the Court of Appeals decided petitioners failed to prove the means of escape from the restraint were unreasonable, neither court examined this obvious analogy to group boycotts to decide whether the restraint was an unreasonable restraint upon trade or commerce.

Petitioner further contends that both courts below clearly violated this court's command in *Board of Trade v. United States,* 246 U.S. 231, 238 (1918), as re-emphasized in *White Motor Co. v. United States,* 372, U.S. 253, 271-2 (1963):

> "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the Courts must

9. White Motor Company v. United States, 372 U.S. 253, 270 (1963).

". . . the problem is not simply whether some justification can be found, but whether the restraint so justified is more restrictive than necessary, or excessively anticompetitive when viewed in light of extenuating interests."

ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adapting the particular remedy, the purpose or end sought to be attained are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation, or the reverse; but because knowledge of intent may help the Court to interpret the facts and to predict consequences."

Petitoner submits that the record clearly demonstrates the relevant facts peculiar to a business; its condition before and after the restraint was imposed (PX 34, 35, 36, 37); its actual and probable effect (R. 302, 305); the history of the restraint (R. 41-43), and the purpose of the restraint. This last named factor was never explained by the Respondent and the only inference that may be drawn from this record is that the restraint imposed does not promote competition but is designed to suppress and destroy competition for employee checking accounts behind the wall of automation.

For these reasons petitioner maintains that Judge Ritter's failure to take account of any of this undisputed evidence and the Court of Appeal's ignoring this evidence by failing to analyze whether the effect of the restraint was reasonable or not clearly violates the doctrine of *Board of Trade and White Motor* (supra) and constitutes reversible error.

(C) *Whether the lower courts erred by failing to consider whether the restraint was ancillary to the main lawful purpose of the contract; and if ancillary,*

whether the resulting effect upon competition exceeds the necessity presented by the main purpose of the contract.

The common law, incorporated into and expanded by the Sherman Act, *United States v. Addyston Pipe and Steel Co.*, 85 Fed. 271 (6th cer. 1898), modified and affirmed 175 U.S. 211 (1899), condemned contractual restrictions upon competition which were not ancillary to the main lawful purpose of the contract, and contractual restrictions which were excessive and not reasonable restraints in light of the lawful objective of the contract. As the then Circuit Judge Taft remarked in *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 282 (6th cir. 1898):

> "The main purpose of the contract suggests the measure of protection needed, and furnishes a sufficiently uniform standard by which the validity of such restraints may be judicially determined, for such a case, if the restraint exceeds the necessity presented by the main lawful purpose for the contract it is void. . . ."

Measured by this standard, the restriction upon employees imposed by Respondents' contracts with employers is unlawful under the Sherman Act. Petitioners maintain that the District Court's refusal to allow petitioners to develop this theory of their case (R. 239-241) and the Court of Appeal's failure to analyze the restraint in favor of examining means of escaping the restraint also constitutes reversible error. (App. A-11).

Respondent and the respective employers purported to be selling and buying computer time and services. (R. 85, 93.) Petitioners did not and do not now

object to Respondent entering the computer service business if it chooses to do so. Petitioners' sole objection is that the requirement that each employee have a checking account with Commercial Security in order to receive their pay pursuant to the contracts is unlawful. Petitioners attempted to show that the requirement that each employee have a checking account with Commercial was not ancillary or necessary (R. 239-41) to the main lawful purpose of the Contract (PX 7, R. 364); and, that even if it was incidental to the main lawful purpose of the contract that the restraint was excessive in light of the alternatives available to the parties (R. 239, 241). When petitioners asked Commercial's officer a hypothetical question based upon computer payroll plan adopted by Congress for processing the pay of Federal employees [10] the Trial Court intervened without objection by opposing counsel, prevented the witness from answering the question, took over interrogation of the witness and answered petitioner's question in the negative (R. 239-41). The Trial Court cut off any further

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10. "Notwithstanding subsection (a) of this section or any other provision of law, and under regulations to be prescribed by the Secretary of the Treasury, the head of an agency may, upon the written request of a person to whom payment is to be made, authorize a disbursing officer to make the payment —

(1) by sending to the financial organization designated by that person a check that is drawn in favor of that organization and for credit to the account of that person; or

(2) if more than one person to whom a payment is to be made designates the same financial organization, by sending to the organization a check that is drawn in favor of the organization for the total amount due those persons and by specifying the amount to be credited to the account of each of those persons." 79 Stat. 582 (1965), 31 U.S.C. § 492 (b) (Supp. 1965).

This statute was adopted after trial of this case, but was merely a ratification of practices federal agencies had engaged in for many years. Senate Report. No 582, 89th Cong. 1st Sess. (1965)

development of this theory of the case and deemed irrelevant whether Commercial's sale of computer time for payroll services could be operated without the objectionable requirement that each employee have a checking account with Commercial (R. 241). Neither the District Court nor the Court of Appeals examined whether this requirement was necessary to the main lawful purpose of the contract or whether its sole purpose was to restrain trade. The record is barren of any evidence offered by Respondent explaining the necessity of this requirement to a contract selling computer time. In the absence of any such justification the inference remains that the sole purpose of the restriction was the restraint of trade and an attempt to monopolize commercial banking in the Ogden area, and, in light of Petitioner's undisputed evidence of the effect of the restriction upon employees under these contracts and upon competition in commercial banking, the undeniable conclusion from this record is that the restraint is excessive even if justification could be offered. Since the District Court arbitrarily precluded any exploration of this issue and the Court of Appeals examined the reasonableness of means to escape the restraint rather than whether the restraint was unlawful in its imposition and its anticompetitive effect, petitioner contends that the lower courts committed a prejudicial and reversible error.

II. ATTEMPT TO MONOPOLIZE IN VIOLATION OF SECTION 2 OF THE SHERMAN ACT.

The lower courts held that the contracts entered into by respondent are not unlawful attempts to monop-

olize. We submit that the lower courts erred as a matter of law in holding that there was "no evidence" of the "specific intent" necessary to prove an attempt to monopolize under Section 2. See *Times-Picayune v. United States*, 245 U.S. 594; *United States v. Griffith*, 334 U.S. 100.

Although a "specific intent" requires more than a showing of an intent to do the act, *United States v. Aluminum Co.*, 148 F. 2d 416, 431-32, it can, of course, like any other element of a case, be proved by circumstantial evidence. It is axiomatic that covenants and contracts having no other purposes than to restrain trade are unlawful, *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271 (1898). The effect of the instant contracts tying employees to the respondent and initially diverting their entire payroll funds into respondent was never shown by respondent to be necessary to the performance of the computer payroll operations (and the trial judge refused to permit petitioners to demonstrate that there is no need to tie employee accounts to the bank performing the payroll functions) (R. 239-241). Indeed, the only purpose served by the tie-in arrangements was to secure a market insulated from the competition of other banks. In short we submit, a restraint having no other purpose than to tie a substantial market to the respondent and thereby withdraw that market from the effective competition of others, is itself substantial evidence of a "specific intent" to monopolize.

Moreover, Commercial's intent to expand the operation of this plan to major employers in the Ogden area is explicit (R. 261). Respondent now has 40%

of the banking business and accounts for 100% of the school board employees coming under the contracts.[11] Respondent clearly has not only the requisite intent, but also the ability and power to impose a clog on competition for small wage-earner accounts and the funds for lending and investment they generate. Thus, the evidence indicated both the necessary intent and the dangerous possibility of monopolizing the employee checking accounts of school board employees and employees of other large employers. The lower courts erred in law in failing to recognize that a restraint upon competition that had no other purpose than to restrain competition, is itself evidence of the intent to achieve that purpose. But in addition the courts also erred in finding that "the two free methods of transferral of funds to other banks" negatives any claim of intent to monopolize (R. 26, App. A-26). In fact, the two free checks discriminatorily given to school employees tended to tie them more closely to respondent, and the "automatic transfer plan" involved no concession at all by respondent, but rather was a plan conceived and effectuated by petitioners in an attempt to mitigate the restraint imposed by respondent.

Finally, the lower courts erred in finding no repugnance to the antitrust laws because other banks are free to compete for employee checking accounts on a wholesale lot basis by contracting with their employers. This position of the lower courts not only infringes upon the right of the individual depositor to choose his own bank, but is also diametrically opposed to the

11. The only school employees not covered by the contracts were student help, substitutes, probationers and school lunch personnel (R 78).

proposition that an increased concentration of sellers or buyers is inherently inimical to competition. *Consolidated Foods Corp. v. Federal Trade Commission,* 380 U.S. 592 (1965); *United States v. Philadelphia National Bank,* 372 U.S. 321 (1961).

COUNTERCLAIM

Petitioner maintained below that the contractual relations between respondent and St. Benedict Hospital, upon which respondent based its counterclaim for tortious interference, were illegal under Sections 1 and 2 of the Sherman Act. The St. Benedict Hospital contract was substantially the same as those of the school boards and the hospital delayed performance because of petitioner's anti-trust objections. The contract was performed subsequent to the trial of petitioner's suit against respondent. Respondent claimed that the delay caused by petitioner's objections communicated to the hospital administrator constituted tortious interference with contractual relations under the law of Utah.

Petitioner contends that the hospital contract is unlawful under Sections 1 and 2 of the Sherman Act for the same reasons that respondent's contracts with the school boards are illegal. Since the lower courts found the contract unlawful they did not decide:

1. Whether Utah law allows a tort action for tortious interference with an unlawful contract. (cf. *Zion's Service Corp. v. Danielson,* 12 Utah 2d 369, 366 P. 2d 982 (1961); *Bunnell v. Bills,* 13 Utah 2d 83, 368 P.2d

597 (1962); *Gammon v. Federated Milk Producers Ass'n, Inc.*, 11 Utah 2d 421, 360 P. 2d 1018 (1961).

2. Whether a federal court may apply state law and award damages for tortious interference with contractual relations illegal under the Sherman Act and be consistent with this court's result in *Dr. Miles Medical Co. v. John D. Parks & Sons Co.*, 220 U.S. 373 (1911). The complaint in *Dr. Miles Medical Co.* was based on tortious interference with contractual relations and relief was denied because the contractual relations interfered with were illegal under the Sherman Act.

3. Whether an award in damages based upon a theory of tortious interference with contractual relations illegal under the Sherman Act makes a federal court a party to carrying out one of the very restraints forbidden by the Sherman Act in violation of the principle of *Continental Wall Paper Co. v. Louis Wight & Sons Co.*, 212 U.S. 227, 261 (1909), as reiterated in *Kelly v. Kosuga*, 358 U.S. 516, 520 (1959). A finding that the hospital contract is illegal under the Sherman Act, therefore, requires reversal of the lower court judgment in favor of respondent on its counterclaim.

CONCLUSION

This case presents an important question for the future of banking competition; namely, whether the fundamental source of banking growth—the checking accounts of individual customers—will no longer be the subject of a bank's competitive effort, but that a bank will be furthering the policy of the Sherman Act

by competing for employer accounts in wholesale lots through the acquisition of the computer payroll account of the employer.

Moreover, the errors of law committed by the lower courts raise important issues regarding the proper application of the Sherman Act. For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

DAVID S. KUNZ
Counsel for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

SEPTEMBER 1966 TERM

BANK OF UTAH, a Utah Corporation, and BANK OF BEN LOMOND, a Utah Corporation,

Appellants,

v.

COMMERCIAL SECURITY BANK, a Utah Corporation,

Appellee.

Civil No. C66-64 No. 8459

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

David S. Kunz (Ronald N. Boyce with him on brief) for Appellants,

Richard Haas (Neil R. Olmstead, Moses Lasky with him on brief) for Appellee.

BEFORE MURRAH, Chief Judge, SETH, Circuit Judge, and CHILSON, District Judge

MURRAH, Chief Judge

At issue in this case is whether appellee Commercial Security Bank's contracts to supply the Ogden City and Weber County, Utah, School Boards with the "no-check" payroll service violates Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1, 2.[1] Appellants Bank of Utah and Bank of Ben Lomond sued Commercial Security alleging the contracts constituted an unlawful restraint under §1 and an attempt to monopolize under §2 and seeking treble damages and injunctive relief. Commercial Security counterclaimed alleging tortious interference with its contract to perform the "no-check" service for an Ogden hospital. After trial to the court, the complaint was dismissed and Commercial Security awarded $7251.22 on its counterclaim. From this judgment the Bank of Utah and Bank of Ben Lomond appeal.

Within appellants' trading area, which was described as including Weber County[2] and parts of surrounding counties, at least eight commercial banks do business. Four of these banks are located in Ogden; their total resources on April 15, 1964, (the date closest to trial for which figures are available in the record) were approximately as follows: Bank of Utah—$16 million, Bank of Ben Lomond—$3 million, Commercial Security Bank—$50 million, and First Security Bank (a statewide chain)—$350 million.

In order to reduce the costs and simplify the process of handling their payrolls, the Ogden Board in

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15 U.S.C. §2. "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States * * * shall be deemed guilty of a misdemeanor * * * ."

2 The city of Ogden is located in Weber County, Utah.

1961 and the Weber Board in 1963 requested area banks to submit proposals for the performance of payroll services. Appellee and First Security Bank submitted bids to both boards; appellant Bank of Utah submitted a bid to the Weber Board. In both cases the bid of appellee was accepted. Contracts terminable at the will of either party were executed, under which the "no-check" service is provided in return for a fixed monthly charge.[3]

Briefly the "no-check" payroll plan operates as follows: the bank computes the payroll from basic earnings and deductions data provided it by the board. The board issues to the bank one check in the amount of the total net payroll due. The bank in turn credits the net wages due each employee to special checking accounts[4] set up with the bank in the name of each employee. Finally, the bank sends the employee a monthly statement showing gross pay, deductions, and the net pay deposited to his special account. The bank also prepares various other documents, such as social security and withholding tax forms.

A critical aspect of the plan is that each employee

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3 In accordance with general banking practice the Ogden banks give earnings credits to checking account customers based on the average monthly balance in the account. Both boards have maintained checking accounts with Commercial Security and applied the earnings credit against the "no-check" service charge. The court found that these checking accounts were voluntarily maintained, and that either board could at any time withdraw its funds from the checking account and pay in cash the "no-check" service charge.

4 Employees paid under the "no-check" plan were requested by the boards to execute the documents necessary to set up the special accounts. There was no evidence that any board employee objected to this request. In any event the court found that the employees voluntarily agreed to having the special accounts.

can make deposits to and write two free checks per month on his special account without charge. Moreover, although not provided for by the contracts, Commercial Security agreed at the behest of appellants to a second procedure by which an employee may have funds in his account with Commercial Security automatically transferred to either of appellants. Because of these features of the plan the court found that no employee was required to maintain funds on deposit with appellee; that an employee could transfer funds without charge; that the employees were aware of this right; and that many did in fact transfer their salaries from Commercial Security to other banks.

In his exhaustive opinion the trial court concluded that "The setting up of special accounts, when coupled with two free checks to withdraw the funds and the provision for automatic transfer of the funds to other banks, is a reasonable procedure * * * " and not an unreasonable restraint of trade.[5] On the attempt to monopolize charge, the court concluded there was a failure to provide a specific intent to gain market control illegally. Finally, the court concluded on the count-

5 The court was also impressed with the competitive nature of the plan. "I see no reason why banks should not expand upon the use of modern computers and perform payroll accounting services for customer employers. There is nothing inherently wrong or questionable for banks to render such service. Plaintiff banks can, and have, offered the same type of service. They and other banks are completely free to compete with defendant in this field. Progress and the utilization of new instrumentalities and procedures are not prohibited by the Sherman Act * * * Defendant had to compete with plaintiffs and other banks in inaugurating the so-called no-check paroll plan in the Ogden area. It will have to compete with other banks, some larger and some smaller, for other contracts to perform payroll accounting services. Defendant in the past has competed with plaintiffs and other banks for checking account customers, and it will have to do so in the future."

erclaim that because of statements made by officers of appellants to the hospital administrator, the " * * * plaintiffs are liable for toritously inducing the breach of the hospital's contract with defendant Bank."

At the outset, Commercial Security denies that the trial court had jurisdiction of the subject matter under the Sherman Act for the reason that the "no-check" service is neither in nor affects commerce. Indeed, it argues that the trial court so concluded in its finding of fact 20. But, finding 20 merely states that the several paragraphs in appellants' complaint setting out the elements necessary to state a claim under sections 1 and 2 of the Act are "untrue". It is not a finding that jurisdiction is lacking, but rather a general finding that the elements necessary to support a Sherman Act claims were not given.

We think the requisite connection with interstate commerce is present. It is true the transactions here complained of were intrastate, indeed intracounty, i.e. crediting individual checking accounts in an Ogden bank with funds transmitted to it by the Ogden City and Weber County School Boards.[6] And, it is irrelevant that some of a bank's activities are in interstate commerce if those complained of are not. United States v. Yellow Cab Co., et al., 332 U.S. 218; Page v. Work, 290 F.2d 323; Lieberthal v. North County Lanes, Inc., 332 F.2d 269. However, the jurisdictional nexus with interstate commerce may also be demonstrated by a showing that the wholly intrastate activities had a sub-

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6 Any check written on these special accounts to an out of state payee would mave in interstate commerce; but the record is barren of proof that any such checks were written.

stantial effect on interstate commerce. U.S. v. International Boxing Club, 348 U.S. 236; United States v. Shubert, 348 U. S. 222; U. S. v. Employing Plastereres Association, 347 U.S. 186. The average monthly payroll transmitted to Commercial Security under the two contracts was $565,000. Evidence is lacking as to how much of this money would have been deposited in Commercial Security in the absence of the "no-check" plan, and how much was transferred to other banks by free checks and automatic transfer. But, it would be unrealistic to say that Commercial Security did not realize some net increase in deposits and appellants some net decrease, with a corresponding effect on the funds available to the respective banks for their operations in the interstate financial markets in loans and securities. Interstate commerce was thus affected to some extent.

Commercial Security further contends that the Sherman Act is inapplicable here because the antitrust laws do not apply to contracts with governmental agencies acting in their official capacities. See E. W. Wiggins Airways v. Massachusetts Port Authority, 362 F.2d 52; United Mine Workers of America v. Pennington, 381 U.S. 657; Eastern R.R. Presidents' Conference v. Noerr Motor Freight, Inc., 365 U.S. 127; Parker v. Brown, 317 U.S. 341. The record is barren of any mention of this issue of law at any stage of the trial proceedings. In light of this and of the decision we reach on the merits of appellants' contentions, we are not disposed to rule on the issue unless it is jurisdictional. Commercial Security does not contend nor do the cases seem to hold that jurisdiction is lacking

when the complained of activities involve a governmental agency; instead they seem to hold the Act inapplicable and the complaint insufficient to state a claim on which relief can be granted. i.e. see E. W. Wiggins Airways v. Massachusetts Port Authority, supra. We pass then to a consideration of the merits.

Appellants broadly assert, " * * * the record demonstrates that the trial court made seriously erroneous findings of fact which are not supported by the evidence and which were induced by an erroneous view of the law." However, they complain of no specific finding. We must, therefore, assume that only the conclusory findings are in dispute and all supportive findings unchallenged. The court concluded that "The contracts * * * are not in restraint of trade and commerce, are reasonable, do not constitute a combination of conspiracy in restraint of trade or commerce, and do not constitute an attempt by defendant to monopolize any part of trade or commerce." We will disturb this finding only if, despite evidence to support it, we are convinced from the whole record that a mistake has been committed. United States v. U. S. Gypsum, 333 U.S. 364.

On the Section 1 issue it is noteworthy that appellants conceded below that " * * * there has been no per se violation ofthe antitrust act and we are relying on the rule of reason * * * ." But, though they do not contend for a per se violation, they cite and rely upon per se case law. Two of the cases, i.e. Fashion Originators Guild v. Federal Trade Commission, 312 U.S. 457, and Klors, Inc. v. Broadway Hale Stores, Inc., 359 U.S. 207, involve group boycotting. The other case,

Northern Pacific Railway v. United States, 356 U.S. 1, involves a tying arrangement.

There is no boycott in this case; nor can the contracts be said to effect a legally enforceable tying agreement; or is the evidence sufficient to justify an inference that the plan embodied in the contracts unduly deterred the Board employees from utilizing their two free methods of transferring their salaries to banks of their choice. Surely Commercial Security is not per se forbidden to utilize improved business methods and techniques wrought by technological innovations to encourage, even entice, the employees to leave their salaries on deposit, so long as they are not directly or indirectly coerced to do so. Cf. Atlantic Refining Co. v. Federal Trade Commission, 381 U.S. 357, 371, where Atlantic marshalled its full economic power to force its dealers and wholesalers to buy Goodyear products.

We come then to the consideration of the rule of reason, for although no per se violation is shown, " * * * the contracts may yet be banned by Section 1 if unreasonable restraint was either their object or effect." See Times-Picayune v. United States, 345 U.S. 594, 614. The question is whether the restraint involved in having to take some affirmative action to transfer funds from Commercial Security to the bank of the employee's choice is unreasonable. "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before

and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts." Chicago Board of Trade v. United States, 246 U.S. 231, 238; and see White Motor Co. v. United States, 372 U.S. 253, 261; Winn Avenue Warehouse, Inc. Winchester Tobacco Warehouse Co., 339 F.2d 277; Cf. Bale v. Glasgow Board of Trade, Inc., 339 F.2d 281. We think the trial court's application of the rule of reason is clearly correct.

Appellants point to the following evidence which they argue the trial court did not give sufficient consideration: statistical data showing that after the "no-check" plan was effectuated, their growth rate decreased and Commercial Security's increased[7]; testimony of three teachers that they dropped their checking accounts with appellants because of the inconvenience of

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7 Average yearly % growth of total deposits

	C.S.	B.U.	B.B.L.
1954-1961	5.66%	9.71%	
1961-1964	8.54%	6.53%	
Average yearly % growth of demand deposits only			
1954-1961	5.45%	8.06%	
1961-1964	5.69%	0.36%	
No. checking accounts of all types			
1960	10,802	8,081	1,991
1961	12,158	8,371	2,194
1962	12,098	8,356	2,149
1963	12,680	8,079	2,144

Other charts were received reflecting changes in total deposits and in demand deposits only for the period October, 1963-October, 1964, as compared with the previous year. We do not regard these charts as sufficiently representative to be of any probative value in determining the effect of the plan.

maintaining two accounts; testimony of bankers that the deposit of the payroll check is the key to retention of the checking account, and that retention of the checking account is crucial to selling other bank services to that customer; and testimony of Commercial Security officers that they hope to extend the plan to other large employers. They further contend but point to no evidence that they are cut off from attracting new school teachers as customers.

The burden of appellants' argument is that because of the inconvenience in maintaining two accounts referred to by the three teachers, the "no-check" plan has caused the changes in growth rate demonstrated by the statistical data. This effect, they argue, will be multiplied in the future by their inability to "cross-sell" other bank services to lost checking account customers, by their inability to attract new teacher accounts, and by Commercial Security's admitted intention to expand the plan to other employers.

We cannot accept appellants' contentions for the principal reason that the causal connection between the plan and the effects allegedly brought about is simply too tenuous. In the first place, the increase in the rate of growth of Commercial Security's total deposits after 1961 can be explained by its opening of a new main office and a new branch office during that period. Second, while the decrease in the rate of growth of Bank of Utah's demand deposits after 1961 is striking, the fact that the rate stays almost constant for Commercial Security is equally striking. It is possible to infer from this data that Commercial Security's acquisition of checking account customers under the plan actually

resulted in a comparatively small increase in the growth rate of its demand deposits, i.e. most of the "no-check' customers who originally banked elsewhere used one of the two free methods to withdraw their salary from Commercial security. Finally, when we consider that data for First Security Bank, the largest in the Ogden area, is conspicuously absent from the statistics and that the only direct evidence that the plan decreased Bank of Utah's deposits is the testimony of three teachers, we cannot conclude that the effect of the plan condemns it.

The restraint here is minimal—the school board contracts were terminable at will; the boards voluntarily maintained funds on deposit with Commercial Security; the employees voluntarily agreed to have the special checking accounts; there are two free methods by which funds can be transferred from the special accounts (the effort involved in writing a personal check and depositing it in the bank of one's choice cannot be much greater than endorsing a paycheck and depositing it); and appellants are still free to solicit the patronage of the school board employees whose names and addresses are of public record. Absent definitive proof that the plan had an adverse effect on commercial banking in the Ogden area, we think that whatever restraint the plan produced is reasonable in light of the competitive manner in which the contracts were let; the opportunity available to compete in the future for payroll service contracts and individual employee accounts, and the benefits to the boards, their employees and the public. We certainly cannot say the trial court's finding was clearly erroneous.

Appellants further contend that the trial court's opinion indicates he erroneously considered an intent to restrain trade an essential element of a Section 1 claim. Commercial Security concedes an intent to restrain trade has never been held a requisite to violation of Section 1, and the court's opinion does deal with the intent to restrain issue, concluding that the contracts were not " * * * entered into or done with the intent to do wrong to the general public and to restrain the free flow of commerce." Be that as it may, intent is relevant not because good intent will save otherwise objectionable arrangements, " * * * but because knowledge of intent may help the court to interpret facts and to predict consequences," especially where, as here, the very question is whether the transaction is reasonable. See Chicago Board of Trade v. United States, supra, p. 238.

While intent to restrain trade is not essential to violation of Section 1 of the Act, it is clear that a specific intent to destroy competition or build monopoly is crucial to the charge of attempting to monopolize under Section 2. Times-Picayune v. United States, supra, 626; and see Union Carbide and Carbon Corp. v. Nisley, 300 F.2d 561, 585-586. Appellants point to no evidence in contradiction to the court's finding that no such intent was here present, and we thus have no basis on which to hold the finding clearly erroneous. Indeed, the reasoning in the court's opinion that the presence of the two free methods for transferral of funds to other banks "negatives any claim of intent to monopolize" would seem to be clearly correct.

We now turn to appellants' claims relating to error

in the conduct of the trial. They first complain of the court's refusal to permit the witness Myrick to give his opinion on the average time depositors remain with a bank. The question was objected to as lacking a proper foundation. In ruling on the objection the court concluded by saying, " * * * I don't think you can lay a foundation. Go ahead if you think you can, but until you do I won't permit you to ask the question, because I don't think it is material at this juncture or relevant * * *." After some colloquy, appellants' counsel said, "I will not pursue the matter, Your Honor." It is thus apparent that appellants acceded to the ruling of the court and cannot now be heard to complain of his disposal of the objection.

Appellants next assert their exhibit 40 was erroneously excluded. This exhibit contained the answers of 36 of appellants' former customers to a series of questions, including where they presently bank and why they dropped their accounts with appellants. The questions were asked by a Bank of Utah employee. The 36 were alleged to be school board employees, and appellants offered to show by the exhibit that they decided to drop their accounts with appellants and bank exclusively with Commercial Security because of the inconvenience of maintaining two accounts. The exhibit was apparently excluded on grounds of hearsay.

As evidence of why these 36 people dropped their accounts with appellants, this exhibit was unquestionably hearsay and inadmissible. Appellants do not seem to dispute this, but instead seek to support the exhibit as a " * * * survey relevant to establish the effect of

the no check plan on the employees of employers who had accepted the appellee's program." Thus appellants contend that the responses of these 36 were representative of and admissible to show the effect of the plan on all school board and hospital employees under the plan.

In this regard the tendency is to admit the results of properly conducted surveys for whatever they are worth in spite of the hearsay difficulty. See Standard Oil Co. v. Standard Oil Co., 252 F.2d 65, Anno. 76 A.L.R.2d 600, §3; Zippo Manufacturing Co. v. Rogers Imports, Inc., 216 F.Supp. 670. The interviewee's response is viewed as not hearsay or as hearsay but within the present state of mind exception. See Zippo Manufacturing Co. v. Rogers Imports, Inc., supra. In this case, however, we do not even reach the hearsay question as it relates to the admissibility of surveys, for we think the trial court was well within the bounds of discretion in refusing to admit a poll conducted as was this one.

A survey is inadmissible when the sample is clearly not representative of the universe it is intended to reflect. See Hawley Products Co. v. U. S. Trunk Co., 259 F.2d 69, 77; Handbook of Recommended Procedures for the Tral of Protracted Cases, 25 F.R.D. 351, 429[8]; Public Opinion Surveys as Evidence: The

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8 "Polls: Admissibility dependent on correct methodology. The offeror has the burden of establishing that a proffered poll was conducted in accordance with accepted principles of survey research, i.e., that the proper universe was examined, that a representative sample was drawn from that universe, and that the mode of questioning the interviewees was correct. He should be required to show that: the persons conducting the survey were recognized experts; the data gathered was accurately reported;

Pollsters Go to Court, 66 Harv. L.R. 498. Here the universe was either all school board and hospital employees under the plan, or at a minimum all school board employees under the plan. The sample was chosen from neither of those groups but instead from those employees who at one time banked with appellants and later switched exclusively to Commercial Security. In fact the interviewer testified he originally interviewed 50 employees, but that 14 still had accounts with appellants and their responses were, therefore, deleted from the exhibit. Moreover, this deletion of part of the responses furnishes a second reason to exclude the exhibit on the ground it is self-serving. See Sears, Roebuck and Co. v. All States Life Insurance Co., 246 F.2d 161, 171.

Appellants' last procedural claim is that the conduct of the trial court deprived them of a fair trial. They point to numerous portions of the record as evidence that the court examined witnesses, interrogated counsel of the issues, ruled inadmissible evidence to which no objection was made, and generally interfered with the presentation of and was critical of appellants' case. Without attmpting a piecemeal evaluation of appellants' citations to the record we think that to the extent their charges have any validity, the court's actions are explained and justified by the

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the sample design, the questionnaire and the interviewing were in accordance with generally accepted standards of objective procedures and statistics in the field of such surveys; the sample design and the interviews were conducted independently of the attorneys; and the interviewers, trained in this field, had no knowledge of the litigation or the purposes for which the survey was to be used. Normally this showing will be made through the testimony of the persons responsible for the various parts of the survey."

nature of the case. This was an antitrust case tried without a jury. A federal judge is not a mere umpire; "He has both the responsibility of assuring the proper conduct of the trial and the power to bring out the facts of the case." Jordan v. United States, 295 F.2d 355; and see Union Carbide and Carbon Corp. v. Nisley, supra, 586; Ayash v. United States, 352 F.2d 1009. An appraisal of the whole record leaves us with the impression that the questioning by the court of the witnesses and counsel was no more than was necessary to properly understand the matter presented (he was the trier of the facts), and to prevent the proceedings from straying to matters of little or no relevance.

We find nothing in the record so critical or abusive as to indicate bias requiring reversal. Union Carbide and Carbide Corp. v. Nisley, supra, 586; Bowles v. Lentin, 151 F.2d 615, 620. We conclude that appellants received a full and fair hearing on all relevant matter.

THE COUNTERCLAIM

In order to reduce payroll costs St. Benedict's Hospital of Ogden also contracted with Commercial Security for the rendition of the "no-check" service. Bank of Utah officers made several statements to Sister Estelle, the hospital administrator, at least one of which was admittedly intended "to stop the plan".

Appellants first contend that Sister Estelle decided against implementation of the plan because of fear of bad publicity and not because of statements made by Bank of Utah officers; therefore, they argue

the court's finding that appellants induced the breach is clearly erroneous. While fear of bad publicity may have motivated Sister Estelle, the statements made by appellants clearly produced that fear. Moreover, Sister Estelle testified that had it not been for her talks with Bank of Utah officers, "I would have gone on, because I saw no harm in it the [plan]." On this record we certainly cannot say the court's finding was clearly erroneous.

Appellants next argue that even if they caused the breach, they are not liable because their conduct was privileged. It is the law in Utah that one who persuades or conspires with another to breach a contract has committed an actionable tort unless the action is justified. Bunnell v. Bills, 368 P.2d 597; Gammon v. Federated Milk Producers Association, Inc., 360 P.2d 1018; and see Zellinger v. Uvalde Rock Asphalt Co., 316 F.2d 47 and cases cited at p. 50. Appellants concede their action was not privileged on the theory that they are competitors of Commercial Security, see Restatement of Torts §768(2). However, they do argue that their action was privileged as an effort to retain a prior contract or financial interest of their own, i.e. their deposit contracts with hospital employees, Bunnell v. Bills, supra, p. 602, citing Prosser on Torts, §106, p. 737; see also Restatement of Torts, §769.

Assuming that appellants had checking account contracts with a substantial number of hospital employees (there is no proof of this in the record), the contract rights referred to do not seem to be the type envisioned by Prosser or the Restatement. The authorities seem to refer to property or contract rights in the

affairs of the person persuaded. Appellants' rights related only to the employees of the person persuaded. Moreover, the contract rights the appellants rely on have actually been performed; the only executory portion of those contracts is the appellants' duty to pay on demand. They have no contract right to future deposits.

Appellants cite several cases which we think are clearly distinguishable. Hopper v. Lennen and Mitchell, 52 F. Supp. 319, affmd. 146 F.2d 364, involving the privilege of one in a confidential relationship with the breaching party; Hendler v. Cuneo Eastern Press, Inc., 279 F.2d 81, involving the privilege of a prior contractor to induce a subsequent contractor not to perform where both contracts were for precisely the same work; Hope Basket Co. v. Product Advancement Corp., 197 F.2d 1008, upheld as privileged a patent licensee's inducement of other licensees not to pay royalties in order to bring about a class action to test the patent's validity. The latter case seems to be the strongest authority for appellants' position, yet even it is not persuasive for here the appellants are clearly not in the same class with bank depositors.

As a last resort appellants allege that in the interim since judgment was entered, the contract has been consummated and the damages caused by the breach recouped. The certainty of damages was a matter for proof at the trial. We cannot reverse the judgment of a court on the bald allegation made here that the tort in fact caused no damage. We consider only matters in the record.

The judgment is affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION

BANK OF UTAH, a Utah Corporation, and BANK OF BEN LOMOND, a Utah Corporation,
Plaintiffs,

v.

COMMERCIAL SECURITY BANK, a Utah Corporation,
Defendant.

Civil No. C66-64

David S. Kunz and Phillip H. Browning for plaintiffs.
Neil R. Olmstead, Gregory A. Harrison, Moses Lasky and Richard Haas for defendant.

RITTER, District Judge

OPINION

Plaintiffs and defendant are commercial banks in Ogden, Utah. Plaintiffs seek damages and injunctive relief against defendant for claimed violations of Sections 1 and 2 of the Sherman Anti-Trust Act[1] by contracting, combining and conspiring with others in restraint of trade or commerce in commercial banking and

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1. 15 U.S.C. Sec. 1: "Every contract, combination * * * or conspiracy, in restraint of trade or commerce among the several States * * * is declared to be illegal * * * "
15 U.S.C. Sec. 2. "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . . shall be deemed guilty of a misdemeanor * * * "

by attempting to monopolize trade or commerce in that field. They claim that contracts for payroll accounting services between defendant bank and the Boards of Education of Ogden City and Weber County violate the Act. A counterclaim filed by defendant asserts that plaintiffs tortiously induced a breach of a similar contract with the St. Benedict's Hospital.

The contracts involve what is referred to as a "no-check payroll plan," under which payroll accounting procedures are performed by the bank. The plan provides that customer institutions or agencies shall provide the bank with individual employee IBM cards, keep it informed as to subsequent changes in names, addresses and other information, and for each pay period submit to the bank a check for the net payroll together with a payroll journal showing data relative to each employee's earnings and deductions for the current period. After the bank makes necessary detailed analyses it prepares and mails to each employee covered by the plan a combination deposit receipt and earnings record. The bank also credits the net amount due each employee for the pay period to a special account set up in his name with that bank.[2]

Each customer employee is permitted to make deposits to his special account, and to write two checks against it each month without service charge. If an employee does not desire to make further use of the special account he can withdraw his money through use of the two free checks, or he can arrange for the automatic transfer of the funds to any bank of his choice. If he wishes, he may use the special account as a regular checking account. The provision for automatic transfer of funds to other banks was proposed by plaintiff banks and adopted by defendant bank.

The agreed purpose of the plan is to reduce payroll processing costs through the use of modern electronic

2. Under the plan the two service contracts with the Boards of Education involves the setting up of approximately 1,744 special accounts.

computers and the elimination of checks.[3] Besides current and cumulative analyses and reports, the bank prepares quarterly Social Security reports, annual state retirement reports, annual federal W-2 forms for each employee, and several other services.

The plan provides for a fixed charge to be made by the bank. Against this charge the bank allows a credit based upon $100.00 for $100,000.00 net average balance in the customer's account with the bank.[4]

The Ogden City and Weber County Boards of Education are governmental agencies created under the laws of Utah for the purpose of administering public schools. In June, 1961, the Ogden City Board of Education invited Ogden banks to submit proposals for the rendition of off-premises payroll accounting services. Proposals were submitted by defendant bank and the First Security Bank of Utah, N.A., the largest bank in Ogden and not a party to this suit. Defendant's proposal was accepted. It was understood by the parties that the contract was terminable at the will of either party.

In April, 1963, the Weber County Board of Education held conferences with representatives of Ogden banks and considered proposals submitted by plaintiff Bank of Utah,[5] by the First Security Bank of Utah,

3. Prior to the inauguration of the plan employees of the Weber County Board of Education performed the accounting procedures, issued and delivered the checks, etc. The Ogden City Board of Education, however, had for several years employed a commercial computing service bureau to perform the off-premises accounting services, after which its employees prepared and delivered the checks. The new features of the no-check payroll are two-fold: (1) elimination of the preparation of payroll checks, and (2) crediting the net salary of each employee to a special account with the bank and the provisions for two free checks and for automatic transfer of funds.
4. Under the contract with the Ogden City Board of Education there would be no charge if the net average balance in its account with defendant bank is $150,000.00. There would be no charge under the contract with the Weber County Board of Education if its average net balance is $100,000.00.
5. The proposal submitted by the plaintiff Bank of Utah provided for it to perform "complete payroll service" and to credit net salary amounts to special accounts from which the funds could be withdrawn through the use of two free checks. The proposal did not specifically provide for automatic transfer of funds to other banks. It was stated in the proposal that the "Board would be asked to maintain an average daily balance of $100,000.00."

N.A., and by defendant Commercial Security Bank. The board accepted the proposal of defendant bank, and a contract terminable at the will of either party was completed.

Late in 1963 the Order of the Sisters of St. Benedict, which operates the St. Benedict's Hospital in Ogden, asked defendant bank, with which it had maintained its accounts ever since the beginning of the hospital, to submit a written proposal for the performance of payroll processing services. In February, 1964, the defendant's proposal was accepted. Because of statements and representations made by officers of plaintiff banks the Administrator of the Hospital decided to "postpone entering this plan." Defendant bank's contention that plaintiff banks induced a breach of this contract will be discussed further, infra.

It appears from minutes of meetings of the Ogden City Board of Education that both before and after the board had accepted defendant's proposal, meetings were held with representatives of plaintiff Bank of Utah, the First Security Bank of Utah, N.A., and defendant. Among matters discussed were the changing of the board's general account from the First Security Bank to defendant bank, the inauguration of a policy of rotating board of education accounts every 5 years, and reconsideration of the action accepting defendant's data processing plan. At one such meeting in July, 1961, Mr. Frank M. Browning, representing the Bank of Utah, referred to the acceptance of defendant's proposal as the acceptance of "free machine service and labor reaching out beyond the scope of eduaction and setting up an unwise monopoly." His counsel, who was also present, described the employee accounts as "captive accounts" and contended that the playroll plan usurped employees' rights unless they exercised positive action each month and withdrew their funds and placed them in the banks of their choice. The heads of the three banks were urged to meet with the School Superintendent in an effort to "come up with a suggested and acceptable program for

the future." When these meetings produced nothing tangible, further meetings were held with the Board. Finally, in a meeting on September 12, 1961, the board reaffirmed its acceptance of defendant's proposal, decided to change its payroll account from the First Security Bank of Utah, N.A. to defendant bank, but to maintain at the former institution a general account for purposes other than payroll. The Board also went on record as favoring the development of an acceptable program of rotation of accounts.

Despite his prior opposition to the no-check payroll plan, the Executive Vice President of the Bank of Utah, Roderick H. Browning, wrote the Weber County Board of Education on November 13, 1962, proposing such a plan, and made a formal proposal to that Board in writing on April 25, 1963. After defendant's proposal had been accepted by the Weber County Board of Education, Mr. Frank M. Browning wrote all county school teachers, under date of August 19, 1963, in part as follows:

"This move, under the cloak of automation, is one over which we have no control, but we are vitally concerned in preventing any banking institution from freezing teachers' compensation to one bank, which might not be of your choice."

* * * * *

"I feel deeply about being shut off from any privilege of doing business with you under this system. To me it is taking from both you and me the privilege we enjoy under free enterprise. I would appreciate your cooperation in placing your compensation back on a free status."

On August 26, 1963, the Superintendent of County Schools wrote Mr. Frank M. Browning as follows:

"I have been instructed by the Weber County Board of Education to inform you of their extreme displeasure to a letter you have sent to our employees.

"The Board objects to the implications that are made in the letter with such statements as 'under the cloak of automation,' and 'To me it is taking from both you and me the privilege we enjoy under free enterprise.'

"The Board believes that they have been fair and impartial and that you have taken unjust liberty in presenting your program for banking services. The Board feels that it is wholesome for teachers to have an opportunity to bank with you. However, they deem the tone of your letter to be very offensive and in poor taste.

"They observed that 'one catches more business with honey than vinegar.'

"The Board has further instructed me to notify you that there will be no time available for your banks to explain your plan to the teachers during pre-school institutes."

More than a year later, after relations between the Weber County Board of Education and Mr. Frank M. Browning had worsened with the filing of this lawsuit and the demand by Mr. Browning of what the board thought was an excessive price for an easement across property needed by a county school, the board withdrew from plaintiff Bank of Utah the general checking account it had maintained there for a number of years and placed it with the First Security Bank of Utah, N.A. At the same time school funds of 12 county schools were also withdrawn from plaintiff banks, 11 of them being placed with the First Security Bank, and 1 with defendant bank.

I. Plaintiff banks contend that "in the light of the 'rule of reason' . . . the contract which defendant has made with the two school boards constitutes an unreasonable restraint of trade and one which embraces the result of restraint of trade — an attempt to monopolize." It is conceded that there is no monopoly, and that this is not a case involving restraints that are illegal per se.

They argue that the performance of payroll accounting services by the bank, formerly performed by school board personnel or by commercial accounting and computing companies, is a departure from customary and traditional services rendered by banks. When coupled with the allowance of credits for the maintenance of large balances in checking accounts, they argue, the defendant bank is performing "free" services as consideration for the delivery of large blocks of checking account customers. If the bank performed the payroll accounting services without requiring the opening and maintaining of individual employee checking accounts, plaintiffs say, there would be no violation of the Sherman Act, but "when the employer makes a wholesale delivery of his employees' checking accounts to the bank in return for a benefit to the employer, the Sherman Act comes into play."

I disagree with plaintiff's contention that the situation here is like the tying arrangements embodied in "preferential routing" clauses before the Supreme Court in the case of Northern Pacific Ry. Co. v. United States,[6] which were held to "fence" out competing railroads and stifle competition. The "fence" plaintiffs seem to find — the "opening and maintaining" of individual checking accounts with defendant bank — had at least two big gates, or gaps, in it. Each pay period each employee is given two free checks with which to withdraw his money from defendant bank and deposit with the bank of his choice or otherwise use it. In following this procedure the employee merely writes on the face of a check instead of placing an endorsement on the back of a payroll check. Another simple procedure is open to him — one which plaintiff banks themselves proposed. He can make arrangements for automatic transfer of his funds from defendant bank to any bank of his choice. There is no compulsion to maintain and use the special accounts set up by defendant bank. School employees are not fenced in, and competing banks are not fenced out. In effect,

6. 356 U.S. 1.

each employee can prepare his own payroll check. Perhaps it would be more appropriate to describe the plan as a "write-your-own-paycheck" plan, rather than a "no-check payroll" plan.

I see no reason why banks should not expand upon the use of modern computers and perform payroll accounting services for customer employers. There is nothing inherently wrong or questionable for banks to render such service. Plaintiff banks can, and have, offered the same type of service. They and other banks are completely free to compete with defendant in this field. Progress and the utilization of new instrumentalities and procedures are not prohibited by the Sherman Act. As was said recently in Winn Ave. Warehouse, Inc. v. Winchester Tobacco Warehouse Co.[7] "to have competition remain static . . . would violate the natural laws of competition."

Defendant had to compete with plaintiffs and other banks in inaugurating the so-called no-check payroll plan in the Ogden area. It will have to compete with other banks, some larger and some smaller, for other contracts to perform payroll accounting services. Defendant in the past has competed with plaintiffs and other banks for checking account customers, and it will have to do so in the future. I find no unreasonable restraints[8] in this case. When the defendant bank completes its determination of an employee's net salary, some provision must be made to get the funds to the employee. The setting up of special accounts, when coupled with the allowance of two free checks to withdraw the funds and the provision for automatic transfer of the funds to other banks, is a reasonable procedure. The willingness of defendant bank to incorporate into

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7. 339 F.2d 277, 281 (6th Cir.)

8. While the prohibition in the Sherman Act against restraint of trade or commerce is all encompassing, the Supreme Court of the United States has construed it as prohibiting only those contracts or combinations which "unreasonably" restrain competition. Standard Oil Co. of New Jersey v. United States, 221 U.S. 1; Chicago Board of Trade v. United States, 246 U.S. 231; Northern Pacific Ry. Co. v. United States, 356 U.S. 1.

the plan plaintiffs' suggestion for automatic transfer of the funds to other banks, demonstrates a concern for fairness to the school employees and to competing banks.

I find no support in plaintiffs' case for their contention that the data processing contracts with the boards of education were not entered into or performed with a legitimate purpose of reasonably advancing personal interest and developing trade, or that they are of such a character as to give rise to an inference or presumption that they were entered into or done with the intent to do wrong to the general public and to restrain the free flow of commerce. To the contrary, the legitimate interest of the parties was to take advantage of recently developed electronic computers and to pass on to the tax-paying public benefits resulting from considerable savings in time and expense. The purpose was proper, plaintiffs and other banks were afforded opportunities to bid for the contracts, there are no unreasonable restraints in carrying the plan into effect, there is no evidence of wrongful or unreasonable intent, and there is no evidence of any conspiracy or combination to restrain trade or commerce. The very ease with which school employees can withdraw their funds from the special accounts is a measure of the reasonableness of the whole plan, and of the lack of intent to place restraints upon them or upon competing banks. Likewise, I find no attempt to monopolize.

The first essential element in establishing that there has been an attempt to monopolize is to prove a specific subjective intent to gain market control illegally.[9] In Times-Picayune v. United States,[10] the Supreme Court held:

"An insufficient showing of specific intent vitiates this part of the Government's case. While the completed offense of monopolization under Sec. 2 demands only a general intent to do the act, 'for no monopolist monopol-

9. American Football League v. National Football League, 323 F.2d 124, 132, f/n 18 (4th Cir.), and cases cited.
10. 345 U.S. 594, 626.

izes unconscious of what he is doing,' a specific intent to destroy competition or build monopoly is essential to guilt for the mere attempt now charged. . . ." Plaintiffs have not produced proof that defendant's acts were not predominantly motivated by legitimate business aims, but instead were done in order to gain monopoly powers.[11] Defendant's action in proposing that each employee have two free checks to withdraw his money, and its further action in accepting plaintiffs' suggestion that provision be made for automatic transfer of funds to other banks, negatives any claim of intent to monopolize.

There is absent from this case any evidence of an intent to "freeze" employee checking accounts, or make them "captive accounts." The boards of education gave plaintiffs and other banks every reasonable opportunity to bid, and to present their views, even after acceptance of the contracts, and the Ogden City Board cooperated in trying to get the three most prominent banks — Bank of Utah, defendant bank, and First Security Bank of Utah — to "come up with a suggested and acceptable program for the future." That Board also favored the development of an acceptable program for rotation of checking accounts with the banks in Ogden. From the standpoint of defendant and the employees, a checking account is neither frozen nor captive when the employees have two simple methods of obtaining their money and depositing it in whatever banks they choose.

II. Defendant claims that plaintiffs, acting through their officers, tortiously induced a breach of a contract which it entered into with representatives of St. Benedict's Hospital in February, 1964, for the performance by the bank of payroll processing services. At the trial the Controller of the Hospital, Sister Marie, testified that in 1963 she received a directive from the Mother House in Minnesota to take steps to cut down the cost of processing the payroll. She talked with the Hospital Auditor, Mr. Herbert J. Corkey, who was also a director

11. See Independent Iron Works, Inc. v. United States Steel Corp., 322 F. 2d 656, 667 (9th Cir.), cert. den. 375 U.S. 922.

of plaintiff Bank of Ben Lomond. He explained to her the no-check payroll plan and told her that the only "computing center" in Ogden was at the Commercial Security Bank. She discussed the matter with Sister Estelle, the Hospital Administrator, and obtained permission to discuss the matter with representatives of defendant bank. The Hospital had maintained its checking accounts with defendant bank ever since the Hospital came into existence. Defendant prepared a proposal, dated December 31, 1963, which was accepted by the Hospital in February, 1964. With checks distributed on February 28, 1964, the Hospital included a communication explaining the plan to its employees. On March 2, 1964, Mr. Corkey talked with Sister Estelle at the Hospital and told her that although he had no right to warn them about the no-check payroll plan because he had just received a letter from the president of the governing board in Minnesota that he no longer would be auditor for the Hospital, he had come to warn them because Mr. Frank M. Browning was very much disturbed by the fact that they had contracted defendant bank and were planning to adopt the plan. Sister Estelle further testified that Mr. Corkey said that "if you go into it, Mr. Frank Browning will sue you." Sister Estelle also talked with Mr. Roderick Browning, an officer of plaintiff Bank of Utah, who was a patient in the hospital at the time, and who was a member of the hospital lay advisory board. According to Sister Estelle, he asked whether she "knew what it would mean for the small bank," and she quoted him as saying, "Well, there are the two banks, Commercial Security Bank and First Security Bank, and they are more or less in collusion in this type of thing."

Sister Estelle testified further that she had several telephone calls from Mr. Frank M. Browning who told her he had just returned from Washington, D.C. where he had testified before a committee concerning the no-check payroll system, that investigators would come out to investigate the situation, and that she was making a mistake. She quoted him as saying with reference to the

employee checking accounts: "You are captivating their accounts by using the no-check payroll system." In one of these calls Mr. Frank Browning inquired about his son's condition and said: "When Rod is better, we will give you a donation." He also said that "After you get into this system, you will be required to have on hand a deposit of a hundred thousand or a hundred twenty-five thousand dollars in the bank." Upon inquiry, she was advised by the defendant there was no such requirement.

Sister Estelle testified that she consulted with the hospital attorney who advised her that the plan was not illegal, but that "if you fear public relations, it may harm the hospital." After discussing the matter with other Sisters, she "decided that, because of the harm it might do to public relations of the St. Benedict's Hospital that we would postpone entering this plan." Further she testified that if she had not had the conversations with Mr. Corkey, Mr. Roderick Browning and Mr. Frank Browning, "I would have gone on, because I saw no harm in it."

Mr. John Starley, Cashier of defendant bank, testified that after Sister Marie had told him to go ahead with the no-check payroll plan, they programmed the "computer to handle the payroll," ordered the forms they were going to use, and made other arrangements. He testified they spent "$4,251.22 for the programming, sales effort, machine cost, cards, new account set up, and special sales effort. He testified further that the bank had additional IBM equipment on order but it was brought in eight months early in order to take care of this job, at an expense of $3,000.00, making a total expense of $7,251.22.

Counsel for plaintiffs stipulated that at the time. Mr. Frank Browning telephoned Sister Estelle "we had been told by employees of the hospital that the hospital intended to put such a plan into effect." Mr. Browning testified that his purpose in telephoning Sister Estelle was to stop the plan. It follows that plaintiffs are liable

for tortiously inducing the breach of the hospital's contract with defendant bank.[12] In Zellinger v. Uvalde Rock Asphalt Co.[13] the Court held:

"... we have heretofore said, 'The rule that one may not knowingly and intentionally induce another to breach his contract with a third person is too well established to merit extended discussion or the citation of cases.' Paramount Pictures, Inc. v. Leader Press, Inc., 10 Cir., 106 F.2d 229, 232. See Employers' Liability Assur. Corp. v. Freeman, 10 Cir., 229 F.2d 547; Baruch v. Beech Aircraft Corp., 10 Cir., 175 F.2d 1, cert. den. 338 U.S. 900...."

Section 766 of the Restatement of Torts gives the general principle in the following language:

"... one who, without a privilege to do so, induces or otherwise purposely causes a third person not to

(a) perform a contract with another, or

(b) enter into or continue a business relation with another is liable to the other for the harm caused thereby." Section 768 (2) provides:

"(2) The fact that one is a competitor of another for the business of a third person does not create a privilege to cause the third person to commit a breach of contract with the other even under the conditions stated in Subsection (1)."

The reason for the rule is well stated in Imperial Ice Co. v. Rossier:[14]

"... Whatever interest society has in encouraging free and open competition by means not in themselves unlawful, contractual stability is generally accepted as of greater importance than competitive freedom. ..."

12. Arkansas v. Texas, 346 U.S. 368, 369; National Gas Appliance Corp. v. Manitowoc Co., 311 F. 2d 896, 899 (7th Cir.); American Surety Co. v. Schottenbauer, 257 F. 2d 6, 10 (8th Cir.); Phillips & Benjamin Co. v. Ratner, 206 F. 2d 372, 376 (2nd Cir.).

13. 316 F. 2d 47, 50 (10th Cir.).

14. 18 Cal. 2d 33, 36, 112 P. 2d 631, 633.

It is immaterial that the contract was terminable at will.[15]

As Mr. Justice Hughes said in Truax v. Raich:[16]

"The fact that the employment is at the will of the parties, respectively, does not make it one at the will of others."

Plaintiffs' complaint is dismissed and defendant is given judgment on its counterclaim in the sum of $7,251.22.

Filed Aug. 23, 1965

Willis W. Ritter, Chief Judge

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15. Zelinger v. Uvalde Rock Asphalt Co., supra; American Surety Co. v. Schottenbauer, supra.

16. 239 U.S. 33, 38.

APPENDIX C.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The plaintiffs, Bank of Utah and Bank of Ben Lomond, the defendant Commercial Security Bank, and First Security Bank of Utah, N.A., are all corporations engaged in the business of commercial banking in Ogden, Utah. First Security Bank of Utah, N.A., hereafter referred to as "First Security" is a national banking association. The other three banks are organized and existing under the laws of the State of Utah. The Ogden City Board of Education, hereafter called the "Ogden Board," and the Weber County Board of Education, hereafter called the "Weber Board," are governmental agencies created by the laws of the State of Utah and charged with the administration of public schools, the Ogden Board of the schools located in Ogden, Utah, and the Weber Board of all other public schools in Weber County, Utah. The Order of the Sisters of St. Benedict, hereafter called "St. Benedict's," a charitable corporation duly organized and existing under the laws of the State of Minnesota engaged in the operation of St. Benedict's Hospital located in Ogden, Utah. The facts found above relate to all times mentioned in these findings.

2. Desiring to reduce its bookkeeping and the number of its payroll warrants, the Ogden Board shortly before June 13, 1961 requested proposals from banks in Ogden for the rendition to it of payroll services. Pursuant to that request, First Security and defendant each submitted a written proposal, and on June 20, 1961 the Ogden Board, acting in its official capacity, accepted defendant's proposal and thereby entered into a contract with the defendant terminable at the will of either party. By the terms of the contract defendant, in consideration of a monthly service fee to be paid by the Ogden Board, agreed to perform for the Board the services described in Finding 8.

3. Pursuant to the contract, the Clerk of the Ogden Board determines to which employees of the Board it is more economical and convenient for it to pay wages by warrants drawn and delivered to them by the Board, and which can more conveniently and economically be paid by using the services in the second category to sign the documents necessary to open checking accounts in their names in defendant, and the Board each month by means of a single warrant furnishes to defendant funds sufficient to cover the total net wages of employees who voluntarily agree to this procedure. Shortly before payday, defendant credits to each of the employee accounts, without charge to the employee, an amount equal to the net wages paid to the employee, and furnishes to the employee an earning statement showing gross pay, all deductions therefrom, and net pay. The defendant furnishes blank checks to each such employee and allows him to write checks against the account. The first two of the checks per month are without any charge. Defendant prepares for the Ogden Board various records and reports required of the Board by law and other records desired by the Board.

4. Shortly before April 25, 1963 the Weber Board, desiring to reduce its bookkeeping and the number of its payroll warrants, requested proposals from banks in Ogden for rendition to it of payroll services. Pursuant to that request First Security, plaintiff Bank of Utah, and defendant each submitted a written proposal. The proposal of defendant was similar to its proposal to the Ogden Board, referred to in Finding 3. Shortly after April 25, 1963 the Weber Board, acting in its official capacity, accepted defendant's proposal, with some modifications, and thereby entered into a contract with the defendant terminable at the will of either party and similar in its nature to the contract between defendant and the Ogden Board. Pursuant to the contract, defendant performs for the Weber Board services similar to those performed for the Ogden Board, and the employees of the Weber Board who voluntarily agree to have accounts in the defendant bank are paid in the same

manner and have the same checking privileges as those granted to the employees of the Ogden Board. Defendant prepares for the Weber Board the same type of records and reports it prepares for the Ogden Board.

5. No employee of the Ogden Board and no employee of the Weber Board is in any way required to maintain any funds on deposit in Defendant. Without any charge each employee may immediately withdraw in cash or transfer to any other person, including either plaintiff, all or any part of the funds to his credit with defendant. All employees are fully cognizant of their rights, and many in fact transfer their funds from the defendant to other banks, including plaintiffs.

6. At plaintiffs' request, defendant has agreed to an arrangement conceived and formulated by plaintiffs by which any checking account customer of defendant who chooses to do so may have funds in his account automatically transferred from defendant to a checking account maintained by said customer in either of plaintiffs' and such arrangement has been in effect and in operation continuously since requested of defendant by plaintiffs.

7. The names and addresses of the employees of the Ogden Board and of the Weber Board are a matter of public record. Plaintiffs are and have always been free to solicit the patronage of any of them in any way plaintiffs choose, and plaintiffs have in fact done so.

8. Those employees of the Ogden Board and of the Weber Board who do not maintain checking accounts with plaintiffs or who do not otherwise do business with plaintiffs act as they do in this respect because, in the exercise of their own independent judgment, they choose to do so.

9. Continuously since before June, 1961, it has been the practice of each of the parties and of the First Security to allow as a monthly earnings credit to each customer having a regular checking account a percentage

of the average monthly balance in the account, to be used by the customer solely to offset service fees.

10. Since the formation of the respective contracts between defendant and the Ogden Board and defendant and the Weber Board, these Boards have maintained regular checking accounts with defendant. Each has done so voluntarily and without any obligation to do so. In accordance with the general banking practice in Ogden, Utah, the earnings credits of these accounts have been used by the Boards to offset the agreed upon service fees incurred as a result of the services rendered by the defendant as set out above. Should a Board withdraw all or any part of the funds standing in its name at the defendant, as it is free to do at any time, the defendant would collect in cash the agreed upon service fee for payroll services to the extent not offset by earnings credits.

11. Neither the Ogden Board nor the Weber Board can operate without having funds on deposit in demand accounts. Neither the contract between defendant and the Ogden Board nor the contract between defendant and the Weber Board, referred to above, has resulted in an increase in the average amounts of the demand deposits of either Board, and neither of said contracts has caused any diminution of the income received by either Board from investments.

12. By virtue of the respective contracts referred to above between defendant and the Ogden Board and defendant and the Weber Board, those Boards, their employees, and indirectly the taxpayer of Ogden, Utah, and Weber County, Utah, receive valuable services and benefits, and each of the two Boards is able to employ the funds under its control more efficiently than before the formation of the respective contracts.

13. In late 1963, being then a commercial account customer of defendant, and desiring to reduce its bookkeeping and the number of its payroll checks, St. Benedict's requested defendant to submit to it a proposal for the rendition of payroll services. Defendant sub-

mitted a written proposal and, prior to February 28, 1964, St. Benedict's accepted the proposal. It thereby entered into a contract with defendant terminable at the will of either party, and similar to the contract entered into between defendant and the Ogden Board. The services to be rendered by defendant under the contract, the rights and privileges of the employees and of St. Benedict's, and the benefits and advantages to the hospital, its employees, and indirectly to its patients, from carrying out the contract, are similar to those described above relative to the Ogden Board and the Weber Board.

14. After the contract between defendant and St. Benedict's was made, plaintiffs and each of them with knowledge of the contract intentionally induced and caused St. Benedict's to breach the contract and to refuse to proceed thereunder, to defendant's damage in the sum of $7,251.22.

15. The contracts between defendant and the Ogden Board, the Weber Board, and St. Benedict's whether viewed singly or together, are not in restraint of trade and commerce, are reasonable, do not constitute a combination or conspiracy in restraint of trade or commerce, and do not constitute an attempt by defendant to monopolize any part of trade or commerce. None of the contracts restrains any person or trade, and each of them encourages, fosters and enhances competition between the commercial banks doing business in Utah inter se and between the banks and other persons, firms and corporations engaged in the business of rendering data processing services. The record does not establish that defendant has the intent or the ability to monopolize any part of trade or commerce, and there is no evidence that defendant might attain a monopoly in anything.

16. By what it has done defendant has merely offered to provide, for a fee, valuable services which any bank, including either of the plaintiffs, may provide if it wishes to do so, and the rendition of the services by

the defendant is in no way monopolistic or restrictive of trade but is the result of progress and is beneficial to the public and to competition generally. One of the purposes of competition is to promote and encourage the improvement of services offered to the public, and defendant's service described above is not a restraint of competition or an attempt to monopolize, but a product of competition.

17. Because the Weber Board justifiably believed that certain acts and statements of the chief executive officer of plaintiffs were unfair and unwarranted and interfered with the operation of the school system administered by the Board, that Board on September 3, 1964 determined that the funds in the general account which it then maintained with plaintiff Bank of Utah should be withdrawn and deposited in First Security, and that the school funds of the thirteen schools administered by the Weber Board should be withdrawn from plaintiffs and deposited in such other banks as the principals of the schools might select. Pursuant to that determination, all funds in the Weber Board's general account at plaintiff Bank of Utah were withdrawn and deposited with First Security, and all funds of the thirteen schools were withdrawn from plaintiff Bank of Utah and plaintiff Bank of Ben Lomond. The funds of twelve of the schools were deposited at First Security and the funds of one school were deposited with defendant. The determination and action of the Weber Board just described were in no way the conduct of defendant but were the unilateral determination and action of the Weber Board made without consultation with or prior knowledge of defendant.

19. Nothing done by defendant has injured or damaged either plaintiff in its business or property or in any other respect.

20. The averments of paragraphs 2, 7, 8, 11 and 12 of plaintiffs' complaint, as supplemented by the Supplemental Amendment to Plaintiffs' Complaint, are untrue.

Conclusions of Law:

1. Defendant has not violated either Section 1 or Section 2 of the Sherman Act to plaintiffs' damage or at all, and plaintiffs' complaint, as supplemented, should be dismissed, with costs to defendant.

2. Plaintiffs tortiously interfered with a valid and subsisting contract between defendant and the Order of the Sisters of St. Benedict to defendant's damage in the sum of $7,251.22, and defendant is entitled to judgment against plaintiffs in said sum, together with costs.

Dated: September 8, 1965.

Willis W. Ritter
United States District Judge

Filed Sept. 8, 1965

APPENDIX D

JUDGMENT

This action came on for trial (hearing) before the Court, Honorable Willis W. Ritter, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered.

It is Ordered and Adjudged that the plaintiffs' complaint, as supplemented, is dismissed, with costs to defendant; and that the defendant is entitled to judgment against plaintiff in the sum of $7,251.22, together with costs.

Dated at Salt Lake City, Utah, this 8th day of September, 1965.

Andrew John Brennan
Clerk of Court (Seal)

Entered on the docket Sept. 8, 1965.

SUPREME COURT, U.S.

No. 1138

Office-Supreme Court, U.S.
FILED
APR 7 1967
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1966

BANK OF UTAH, a Utah corporation, and BANK OF BEN LOMOND, a Utah corporation,

Petitioners,

vs.

COMMERCIAL SECURITY BANK, a Utah corporation,

Respondent.

Brief for Respondent in Opposition to Petition for Writ of Certiorari

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Brief for Respondent in Opposition to Petition for Writ of Certiorari

OPINIONS BELOW

The opinion of the Court of Appeals is reported in 369 F.2d 19. The opinion of the District Court is reported in 1965 Trade Cas. ¶ 71,540.

JURISDICTION

The District Court had jurisdiction under 15 U.S.C. § 15, the Court of Appeals under 28 U.S.C. § 1291, and this Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Petitioners (plaintiffs in the District Court) base their claims on Sections 1 and 2 of the Sherman Act, which the petition adequately quotes.

QUESTIONS PRESENTED

Petitioners' Questions 1 and 2 are *not* present for they presuppose, as fact, what both courts below found to be untrue. They postulate that employees *"are required"* or *"compel[led]"* to have checking accounts at respondent bank. Both courts below found that employees were not required or compelled to do anything. Petitioners' Question 3 relates to a judgment rendered against them under Utah law on a counterclaim for tortious interference with a contract. That question postulates that the contract appellants interfered with was illegal under the Sherman Act. Since it was not, as both courts below held, the question vanishes.

The sole question is whether both courts erred in holding that there was no violation of the Sherman Act in an arrangement, terminable at the will of either party, whereby an employer engages a bank to use its computer facilities to handle its payroll for such employees who voluntarily elect to be paid in this way.

STATEMENT OF THE CASE

Petitioners seek to bring the case here after a plenary trial in the District Court, followed by comprehensive opinions in both the District Court and the Court of Appeals, with a full set of findings of the District Court wholly endorsed and concurred in by the Court of Appeals. In view of the "two court rule", *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275; *Berenyi v. Immigration Service*, 385 U.S. ..... (Jan. 23, 1967), we rest our recital of the facts almost entirely upon the findings and statements of fact in the opinions.

The development of computers has simplified record keeping and has made it possible to handle large payrolls more efficiently and cheaply. Since most employers cannot afford to own computer equipment, a practice has arisen to engage the services of a bank. The employer informs the bank of the names of its employees, their salaries and the various deductions that must be made (e.g., withholding tax, social security, authorized union dues, group insurance premiums, etc.) and entrusts to the bank a lump sum adequate to cover the payroll. The bank computes the amounts due each pay day to each employee, attends to preparing all necessary records, and pays the employees. For this service it makes a service charge. If the employer maintains an account with the bank, an earnings credit on the account may cover the charge.

This case involves such arrangements between respondent and each of the Ogden, Utah, School Board and the Weber County, Utah, School Board, entered into after competition in which petitioner Bank of Utah participated. In the words of the Court of Appeals (Pet. A-2):*

> "In order to reduce the costs and simplify the process of handling their payrolls, the Ogden Board in 1961 and the Weber Board in 1963 requested area banks to submit proposals for the performance of payroll services. Appellee [respondent] and First Security Bank submitted bids to both boards; *appellant Bank of Utah submitted a bid to the Weber Board.* In both cases the bid of appellee [respondent] was accepted. Contracts terminable at the will of either party were executed, under which the 'no-check' service is provided in return for a fixed monthly charge."

In offering its service to the Weber Board, petitioner Bank of Utah wrote to it thus:

> "You are probably aware of the changes that have been taking place in payroll accounting, in which businesses and

*The opinion of the Court of Appeals is printed as Appendix A to the Petition at pages A-1 to A-18.

governmental agencies have joined with individual banks *in progressive efforts to help hold down the mounting costs of administration.*

* * * * * * *

"We realize that cost reduction is always a consideration in your planning and * * * the Bank of Utah is fully prepared to offer a complete service in this field." (D. Ex. B, R. 462-464)*

Having lost out to respondent in the competitive race for the business, petitioners conceived the idea of invoking the Sherman Act to gain what they had lost by the operation of competition and brought this suit. They "conceded * * * that '* * * there has been no per se violation of the Antitrust Act and we are relying on the rule of reason * * *.'" (So stated in the opinion of the Court of Appeals, Pet. App. A-7.) But they assailed the contracts between the school boards and respondent as illegal under Section 1 of the Act as working an "unreasonable restraint of trade". And they charged a violation of Section 2, claiming no "monopolization" but limiting the charge to that of an "attempt to monopolize" commercial banking.

Under the arrangement between respondent and each school board, the bank enters to the credit of each employee participating an amount equal to his pay; the employee is allowed two "free checks" per month, so that without any charge, burden or hindrance he may transfer the funds to any other bank or to anyone else or withdraw it as cash. Moreover, under an arrangement requested by petitioners and acquiesced in by respondent, the latter will automatically transfer any employee's credit balance to either petitioner, if authorized to do so by the employee.

No employee is required or compelled to accept a credit at respondent. Under Utah statute, every employee has a right to be paid in cash or by check of his employer, if he so chooses.

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*"R." refers to the Record below.

(U.C.A. Section 34-10-4).* At the outset respondent pointed out to each of the school boards that no employee could be forced into the plan. It gave to the Ogden Board (R. 78) a copy of an opinion of counsel that under this law an employee had to be paid by cash or check unless he elected to be paid by the proposed procedure (P. Ex. 9, R. 373) and incorporated the opinion in its proposal to the Weber Board (P. Ex. 46, R. 449, 459). Each employee paid under the plan has first voluntarily signed and delivered to respondent the signature cards and other documents necessary to the opening of a checking account (R. 80). The District Court's Finding 3 finds (Pet. App. A-34†):

> "3. Pursuant to the contract, the Clerk of the Ogden Board determines to which employees of the Board it is more economical and convenient for it to pay wages by warrants drawn and delivered to them by the Board, and which can more conveniently and economically be paid by using the services of defendant. The Clerk requests employees falling in the second category to sign the documents necessary to open checking accounts in their names in defendant, and the Board each month by means of a single warrant furnishes to defendant funds sufficient to cover the total net wages of employees *who voluntarily agree to this procedure.*"

Finding 4 states (Pet. App. A-34):

> "* * * Pursuant to the contract, defendant performs for the Weber Board services similar to those performed for the Ogden Board, and the employees of the Weber Board *who*

*Utah Code Annotated (1953), section 34-10-4 provides:

> "He [the employer] shall pay such wages in full, in lawful money of the United States, or checks on banks convertible into cash on demand at full face value thereof."

†The District Court's Findings appear as Appendix C to the Petition at pp. A-33 through A-39. Finding 3 is misquoted in that appendix by the omission of the words "of defendant" at the end of the first sentence and the words "The Clerk requests employees falling in" at the beginning of the second sentence.

> *voluntarily agree to have accounts in the defendant bank* are paid in the same manner and have the same checking privileges as those granted to the employees of the Ogden Board."

These findings were not even assailed by petitioners on the appeal, and the Court of Appeals endorsed them fully. Its opinion states (Pet. App. A-11):

> "the school board contracts were terminable at will; the boards voluntarily maintained funds on deposit with Commercial Security; the employees voluntarily agreed to have the special checking accounts;"

The District Court found as to the charge under Section 1 of the Sherman Act that there was no restraint of trade at all and that whatever occurred was reasonable. Its Finding 15 (Pet. App. A-37) reads:

> "15. The contracts between defendant and the Ogden Board, the Weber Board, and St. Benedict's whether viewed singly or together, are not in restraint of trade and commerce, are reasonable, do not constitute a combination or conspiracy in restraint of trade or commerce, * * *. None of the contracts restrains any person or trade, and each of them encourages, fosters and enhances competition between the commercial banks doing business in Utah inter se and between the banks and other persons, firms and corporations engaged in the business of rendering data processing services."

As to the Section 2 charge, the District Court's Finding 15 (Pet. App. A-37) states that the contracts

> "do not constitute an attempt by defendant to monopolize any part of trade or commerce * * *. The record does not establish that defendant has the intent or the ability to monopolize any part of trade or commerce, and there is no evidence that defendant might attain a monopoly in anything."

The Court of Appeals affirmed a judgment for respondent (defendant). It held that if there was any "restraint involved in having to take some affirmative action to transfer funds from Commercial Security to the bank of the employee's choice" (Pet. App. A-8), it was "minimal" and "reasonable" (Pet. App. A-11), and it held that the finding that there was no attempt to monopolize was "clearly correct" under the evidence (Pet. App. A-12). Further, it held, the evidence adduced to support the claim that petitioners had sustained damage was "simply too tenuous" (Pet. App. A-10).

DISCUSSION

It is difficult to characterize the attempt to base a Sherman Act case on the facts as anything but bizarre. The case can aptly be described by a sentence in *H. E. Fletcher Co. v. Rock of Ages Corporation*, 326 F.2d 13, 17 (2 Cir.):

> "Despite the conventional antitrust trappings with which the case has been draped, what we have here, so far as the papers show, is essentially a private squabble between two sets of * * * businessmen."

Patently, there is no illegality in a bank's performing payroll bookkeeping for an employer. This is so inescapable that petitioners concede it, despite their discontent that the school boards each year deposit with respondent $6,700,000 to meet payrolls (Pet. 19). Almost at the end of the petition, they bring their whole case to this focus (Pet. 29-30):

> "Respondent and the respective employers purported to be selling and buying computer time and services. (R. 85, 93.) Petitioners did not and do not now object to Respondent entering the computer service business if it chooses to do so. Petitioners' sole objection is that the requirement that each employee have a checking account with Commercial Security in order to receive their pay pursuant to the contracts is unlawful."

As already stated, there was *no* requirement that any employee have a checking account at respondent. But quite apart from that, the contention is readily seen to be empty. Just as there can be no objection to the bank's performing the payroll bookkeeping, it is patent that there is no illegality in the employer's transmitting a lump sum to the bank and in the latter's receiving it to act as the disbursing agent to pay to employees their wages and salaries. One bank cannot complain that an employer maintains its entire payroll account at another bank, or that the other bank has succeeded in a competitive race to obtain the accounts of a number of employers.*

As the disbursing agent, the bank must then get the pay to the employees. If it were to follow the archaic practice of paying each employee, in cash, by delivering to him an envelope containing currency or silver, petitioners would not be objecting (at least they could not). Or if the bank were to mail to each employee either a check drawn by the school board or a cashier's check of the bank, there would be no objection. Whether the check was the school board's or the bank's, the employee would endorse it, cash it at his grocer's or supermarket or the like, or deposit it in some bank.

The difference between this procedure and what was done was, from the standpoint of pragmatics, one of simplification and, from the standpoint of law, nothing at all. The use of checks and checking accounts, which characterized the first half of this century, eliminated the need of transporting cash and replaced it by the transmission of pieces of paper. The use of computers, arising in the '60s, leads to further simplification of our credit economy by making it possible to eliminate the issuance and handling of endless pieces of paper by substituting speedy electronic transmission of credits and debits. In the present case, instead of the employer or bank writing a payroll check to the

*What the legal result would be were a state of monopolization achieved might be a different question, but there was no such charge in this case.

employee's order, *the employee himself is permitted to write his own payroll check.* Instead of signing his name on the back of his paycheck by endorsing it, the employee puts his signature on the front, by signing his name as the drawer. Whether he has placed his name on the back of a slip of paper—a check—as an endorser, or on the front as the drawer, he then does exactly the same thing with that piece of paper; he cashes it at the grocer, pays a bill, or deposits it in some bank. Both courts below recognized the simplicity of the matter:

> "* * * the employee merely writes on the face of a check instead of placing an endorsement on the back of a payroll check" (Opinion, District Court, Pet. App. A-25).
>
> "* * * there are two free methods by which funds can be transferred from the special accounts (the effort involved in writing a personal check and depositing it in the bank of one's choice cannot be much greater than endorsing a paycheck and depositing it)" (Opinion, Court of Appeals, Pet. App. A-11).

Petitioners' argument about employees' maintaining accounts at respondent bank loses sight of substance in words and ignores elementary principles of the law of "bills and notes." An account is nothing but a credit. If an employer deposits its payroll funds in a bank of its choice, as it has every right to do, and draws its own check to the employee's order, the effect of that action is to instruct the bank to pay to the employee or his order a sum of money against the credit theretofore possessed by the employer. That, of course, is the very nature of a check, as shown by the Uniform Negotiable Instruments Act (N.I.L.) in effect in every state before the new Commercial Code.* An exact equivalent

---

*N.I.L., Sec. 185:

"A check is a bill of exchange drawn on a bank payable on demand".

N.I.L., Sec. 126:

"A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer."

would be for the employer to give the bank a general instruction to "honor" or "accept" drafts drawn on it by the employee up to certain amounts, and to charge the employer's account. Thus N.I.L. Sec. 132 provides that "The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer"; N.I.L. Sec. 135 provides that "An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon faith thereof, receives the bill for value." The setting up of a credit in the amount of his salary in the name of each employee is equivalent to just such a prior agreement by the bank to accept the employee's draft, i.e., to pay the amount to him or his order against a credit theretofore possessed by the employee. If some charge were imposed on the employee in following this course, another question might arise. But no such burden was. The right to draw two checks without any charge enables the employee to place his pay anywhere he wants, exactly as before, and yet saves the employer the expense and burden of preparing, delivering, and reconciling payroll checks and saves the bank the expense of the unnecessary intermediate step of preparing and delivering checks. To talk about requiring employees to have a checking account with respondent is simply fallacious.

In the end, petitioners are forced to concede that no compulsions and no coercions are placed on anyone, that employees *are not constrained against their will* to do or to refrain from doing anything. The real burden of petitioners' complaint is that the set-up is so "convenient" for the employee that he is "sold" on the idea of maintaining an account with respondent; in other words, he is persuaded to do so in the exercise of his own free will. The alleged "restraint" is found in "the practical factors of convenience and simplification of customer relations" (Pet. 26). The Court of Appeals analyzed the evidence in detail and found it lacking, "simply too tenuous" to show that even this occurred

(Pet. App. A-10), although it thought it "unrealistic to say that Commercial Security did not realize some net increase in deposits" (Pet. App. A-6).

But if so, it is a tribute to the beneficent results of competition. Competition is prized because it leads to goods and services more "convenient" to the public. If respondent, instead of offering a payroll service based on data processing equipment, had offered a service of having couriers on motorcycles call on the school boards for the payroll checks, deliver them to the employees, offer to wait for their endorsements and bring them back for deposit, this would have been a "convenience", but no one would think of condemning it under the Sherman Act because it brought customers to respondent who formerly banked with a petitioner. "The weapons in competition are various. Superior energy . . . more convenient packages . . . and many others, are and always have been considered proper weapons", *Sinclair Refining Co. v. Federal Trade Commission,* 276 Fed. 686, 688 (7th Cir.), aff'd 261 U. S. 463.

The Sherman Act is designed to *protect competition,* not disgruntled *competitors* who claim to have lost business from the very competition which the antitrust laws command. *Federal Trade Commission v. Sun Oil Co.,* 371 U. S. 505, 519; *Atlas Building Prod. Co. v. Diamond Block & Gravel Co.,* 269 F.2d 950, 954, cer. den. 363 U. S. 843; *Ben Hur Coal Co. v. Wells,* 242 F.2d 481, 486 (10 Cir.) cer. den. 354 U. S. 910. The ideal of free competition and the emphasis placed on it by the antitrust laws rest on the conviction that the race for the public's good will and favor will bring to the public lower prices *and better services* by acting as a stimulus to the wit and invention of man. The antitrust laws do not prohibit, they encourage, the development and utilization of new instrumentalities to serve mankind. *Winn Ave. Warehouse, Inc. v. Winchester Tobacco Co.,* 339 F.2d 277, 281 (6 Cir.). The scientific creation of modern computers in the last decade has made

it possible to meet payrolls by new methods which save the employer both time and money, and the development of the kind of payroll service involved in this case was one of the beneficent results of the free play of competition.

As for the claim of an "attempt to monopolize" violative of Section 2 of the Sherman Act, an essential element of that offense is the specific intent to destroy competition or build a monopoly. *Times-Picayune v. United States,* 345 U. S. 594, 626; *Independent Iron Works, Inc. v. U. S. Steel Corporation,* 322 F.2d 656, 667 (9 Cir.), cer. den. 375 U.S. 922. Intent is a pure question of fact, and both courts below have absolved respondent of any guilty intent. As the Court of Appeals said (Pet. App. A-12):

> "Appellants point to no evidence in contradiction to the court's finding that no such intent was here present, and we thus have no basis on which to hold the finding clearly erroneous. Indeed, the reasoning in the court's opinion that the presence of the two free methods for transferral of funds to other banks 'negatives any claim of intent to monopolize' would seem to be clearly correct."

CONCLUSION

It is respectfully submitted that the petition should be denied.

Dated: San Francisco, California, April 5, 1967.

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FILED
APR 14 1967
JOHN F. DAVIS, CLERK

No. 1138

In the Supreme Court of the United States

OCTOBER TERM 1966

BANK OF UTAH, a Utah corporation, and
BANK OF BEN LOMOND, a Utah corporation,

Petitioners,

v.

COMMERCIAL SECURITY BANK,
a Utah corporation,

Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent's brief in opposition is based upon a false statement of the basic nature of respondent's contract. Respondent asserts that "there was no requirement that any employee have a checking account with respondent" (Resp. brief p. 8). Obviously there could be no such contractual requirement binding on

the employees as they were not parties to the contract. The uncontested fact is that the contracts do provide that each employee would be paid through a checking account at respondent. Moreover, it is also uncontested that all 1744 regular employees of the two school boards covered by the contracts did, in fact, have checking accounts opened in their names at respondent. (Pl. Ex. 8, R. 368, Pl. Ex. 46, R. 449, Def. Ex. Y, R. 486). Respondent's brief in effect represents to this Court that 60% of the regular school board employees "voluntarily" and simultaneously agreed to open checking accounts at the time the "no check" payroll plan was inaugurated by respondent and their employees. Respondent, in designating their plan, the "no check payroll system" (Pl. Ex. 8, R. 369), intended that no checks be issued to the employees of the employers coming under the plan and in fact no checks were issued. Although respondent maintains that this remarkable unanimity was strictly "voluntary," petitioner produced a hospital employee who testified he was threatened by the loss of his job unless he agreed to open a checking account with respondent for the receipt of his pay (R. 345-348).

In presenting the "no check" plan to the Ogden Board respondent's vice president was asked "whether or not each teacher should be given an opportunity to select his bank. Mr. Baker (respondent's vice president) replied that a wide-spread selection of numerous banks would nullify the major portion of the economy to be realized from the "no check" plan, and that the two free checks feature of the plan presented a freedom of choice to each individual" (Pl. Ex. 7, R. 364).

Respondent did not produce a single employee of either school boards to testify that he ever heard of an optional method of receiving his pay, or a regular school employee who in fact did receive his pay in a manner other than through a checking account with respondent. The reason for the failure to produce such a witness is that none existed. The record is clear that all regular employees of both boards of education, from the Superintendent down to the janitors and bus drivers, regardless of their previous banking habits in a city of four banks, received their pay through a checking account at respondent bank (R. 77, 78, 212).

Petitioner contends that only a most naive person could, in the face of the record in this case, accept respondent's claim that all regular school employees "voluntarily" agreed to open checking accounts with respondent. The analogy of the facts of this case to the facts of *Atlantic Refining v. Federal Trade Commission,* 381 U.S. 357, is startling.

Many financial writers have described coming trends in computerized banking services as the "checkless society". If these predictions are accurate, and there are many indications of their accuracy, then it becomes a matter of the greatest national importance that this court now determine the application of anti-trust principles to these new developments in banking. The issue can be simplified to this: Shall the individual worker remain free to select the bank for the deposit of his earnings; or shall respondent's "no check payroll plan" be approved by this Court and the employer and the employer's banker be permitted to deny the worker this freedom of choice by making the deposit of the

worker's earnings in the employer's bank a condition of his employment? This is an issue of importance to the individual worker and to banks all over the country.

Respectfully submitted,

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